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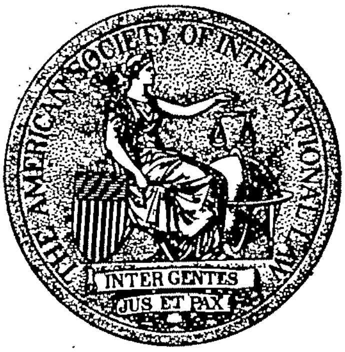
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# THE WORK OF THE SECOND HAGUE PEACE CONFERENCE

The Second International Peace Conference, like its predecessor of 1899, endeavored to humanize the hardships necessarily incident to war and to substitute for a resort to arms a pacific settlement of international grievances, which, if unsettled, might lead to war or make the maintenance of pacific relations difficult and problematical. The conference of 1907, no more than its immediate predecessor, satisfied the leaders of humanitarian thought. War was not abolished, nor was peace legislated into existence. Universal disarmament was as unacceptable in 1907 as in 1899, and some few nations were still unwilling to bind themselves to refer all international disputes not involving independence, vital interests, or national honor to a court of arbitration.

Deeply interested in the success of these projects, the great public felt that their failure necessarily involved the failure of the conference, notwithstanding that many wise and humanitarian measures falling short of the goal were incorporated into the law of nations. But we should not in our disappointment, and perhaps bitterness of soul, overlook positive and beneficent progress, and if we could not take the advanced position outlined by the friends of peace, we should nevertheless rejoice that many a mile-stone has been passed. We must not forget that an international conference is different from a parliament; that independent and sovereign nations are not bound by majorities, and that positive results are obtained by compromising upon desirable but perhaps less advanced projects. The aim of a conference is to lay down a law for all, not for the many, much less for the few; to establish a law which will be international because it is accepted and enforced by all nations.

The work of the conference concerned the modification of existing international law; international differences of opinion and interpretation were adjusted; doubt gave place to certainty; and, after much consideration and reflection, principles of international law were fortified, modified in part, or wholly discarded. A complete code was not established — it is doubtful whether custom and usage are ripe for codification — but important topics of international law were given the symmetry and precision of a code.

It may be maintained that international law is law in the strict sense of the word, or it may be contended that it lacks an essential element of law, because there is no international sheriff; that it is international morality or ethics; or that finally a law of nations is the occupation of the theorist and the hope of the dreamer. However opinions may differ as to the nature of international law, there can be no doubt of the existence of certain rules and regulations which do by common consent control the conduct of independent nations; nor can there be any reasonable doubt that enlightened people of all countries take a deep and abiding interest in international law, and share the hope of the dreamer, not only that greater precision may be given to its principles, but that the principles themselves may be developed and applied with the certainty and precision of a municipal code.

From the cell of the cloister international law passed into the study of the philosopher, the jurist, and the scholar; from the study it entered the cabinets of Europe, and for two centuries and more a recognized system of international law has determined the foreign relations of nations; from the cabinet to courts of justice, where the rights of nations as well as individuals have been debated and enforced; and finally, from the court-room international law has made its way to the people, who, in last resort, dominate court and cabinet, and enlist in their service scholar as well as priest.

It was a wise remark of Sir James Mackintosh that constitutions are not made: they grow; for history demonstrates that unnatural unions dissolve; that unnatural alliances have little permanency; that constitutions struck off at the heat of a moment in times of excitement disappear with the causes to which they owe their origin. Constitutions are, in a large and broad sense of the word, codifications. They put into written and permanent form the usages and customs of the past, and they last because the spirit underlying these usages and customs is wrapped up with the existence and destiny of the people. The Constitution of the United States has lasted, because it was based upon the usages and customs of England, as modified by the experience in the colonies, and the Constitution will last as long as it answers the needs of its framers, and no longer. To understand, however, the Constitution, English customs and usages must be studied, and to predict the lines of development we must interpret the language of the Constitution in the light of its origin, as well as in the concrete case under investigation. It is the same with law. Law is not imposed as a system upon the people. Isolated usage develops into habit; the habit becomes crystallized into custom; and to custom there is given, consciously and unconsciously, the force of law.

The common law of England is not due to the wisdom of any one person or of any one age. It grew to meet a need; it changed with that need, and disappeared when it could no longer subserve a useful purpose. It is a growth, an organism, not a crystallization.

When, however, the process of development did not keep abreast of the age, or when new and unsuspected needs required special treatment, statutes made their appearance to supply the lack or to correct the evil. The statute would be special if a special point were involved. The statute would be general in its terms if the evil to be corrected were general, or the need of the statute was of a general, wide-spread nature. The more rapid the development of the country, the greater and more diversified become the needs of an enterprising and progressive community, and consequently the more frequent would be and must be the resort to statutory enactments, in order to safeguard the rights and interests created as the result of changed conditions. Hence, it follows that a system of law in its early stages springs directly out of the needs of the people. If the needs be simple, the law, of which custom is the very life, is simple. It is said to be unwritten in the sense that no custom is at once the law and the evidence, although in process of time the customs are naturally reduced to writing by people learned in customary law, and it is given precision by decrees of courts of justice. Complex situations give rise to a complex system of law, and the natural development of custom not being sufficient, the legislature steps in by statute to accelerate the development and to give to the system of law the precision, the solidity, and the refinement necessary for a complicated and progressive civilization. In this development, then, we have the local usage, the custom, and the statute.

If we turn from the common law to international law, we find that the course of development of the common law of nations has been singularly like that of the common law of England.

We first have the usages of enlightened nations. These usages spread, gain weight and influence by repeated application. We next find that the usages have taken on the form of custom, and nations from isolated or frequent usage regard the custom as binding upon them. That which is claimed as a right on the one side becomes a duty on the other, for right and duty are correlative. The demand in itself is a consent to the rule of law. The yielding to the demand is an acknowledgment of the rightfulness of the custom.

We thence have customary rules and regulations binding nations in their mutual intercourse, because the nations, either by enforcing the custom or yielding to the custom sought to be enforced, have given to the custom the weight of law. But just as the common law of England grew slowly, indeed imperceptibly, so have the usages of nations developed slowly and imperceptibly. When nations had little intercourse with one another, the need for a system of law regulating such relations was of little moment. As nations have grown, as they have come into closer contact, as no nation lives and can live in the modern world in a state of isolation, it necessarily follows that the usages and customs of nations must be developed in order adequately to meet changed conditions. The independence of the state is the very postulate of international law; but the solidarity of interest has made itself felt to such a degree that nations have yielded and must in the future yield something of their absolute liberty and independence, just as a citizen yields his absolute freedom for the benefit of society, of which he is a part.

We see, then, from this brief and imperfect sketch of the origin and nature of the common law of one particular jurisdiction, an analogy between the common law of nations, namely, the usages and customs of many nations. We find, or at least we can assume, that when only one nation existed there could be no international law; two nations existing would have comparatively little intercourse and the rules and regulations governing their intercourse would, therefore, be simple. As the two gave place to the many, and as intercourse became very frequent, the need of a more elaborate code would become evident. Usage and custom would grow to meet the need, and in the course of time, insensibly and imperceptibly, usage and custom would take the dimensions of a code. But while that is entirely true generally, it is true with much greater force in the present and, indeed, in the immediate past; for the discovery of the new world, North and South America, and the contest for the possession of this world; the establishment of colonies with the various colonial systems, and the conflicts of interest that necessarily arose, would require a system of law adequate to settle them; and when nations became more closely connected, more intimately and frequently involved, it followed that the simplicity of the earlier usages and customs would either give place to a more complicated code or would themselves be developed in order to meet the growing needs.

Now, how could this be done? In this way. As nations became more closely united or related, previous usage or custom was found to be inadequate; but the spirit pervading the usage or custom was discovered and developed, precisely as the spirit in the common law was developed in order to meet a changed condition of affairs. Just as in appropriate cases the municipal legislature stepped in and corrected an abuse or covered a field by statute, conferences were held between rulers, treaties were negotiated to regulate a specific concrete controversy, and finally congresses, usually not at the beginning but at the end of the controversy, composed of many states, because the interests of many were concerned, were convened in order that that might remain settled in peace which had been established in war. The conference or congress is, it would seem, not far removed from an international legislature, whose acts are submitted *ad referendum* to the participating nations.

We therefore find that treaties mark the first general step in the development of the law of nations as between nations in recent years, for it is only in the modern world that treaties have gone far to correct inequality and to establish a system of international relations. The special or individual treaties will be comparatively simple in the principles of law announced or defined — although complicated in other respects. When the many were involved, a congress or conference came naturally into being, with the result that in this conference the questions causing the conflict would be considered and regulated, in the hope to prevent a recurrence of the conflict. The conferences and congresses were at the conclusion of a dispute. The appeal was indeed to reason, but it was unfortunately belated. Interesting examples of the post-mortem appeal to reason are furnished by the Treaty of Westphalia (1648), the Congress of Vienna (1814–15), the Congress of Paris (1856), the Congress of Berlin (1878). The Treaty of Westphalia was negotiated by representatives of the states engaged in the Thirty Years' War and the state affairs established was hoped to be durable.

Passing over the conference and treaties concluding the wars of Louis XIV. — of which the various treaties of Utrecht of 1713–1714 were the most important and far reaching in detail as well as in principle — we come to the Congress of Vienna, which attempted, by a rigid and thorough application of the principle of legitimacy, to reconstruct Europe upon permanent lines after the crash of the French Revolution and the downfall of Napoleon. The great powers agreed among themselves and legislated for the rest of Europe. The work, therefore, was largely political, but as all were concerned all were present or bound by the determinations of the congress. It was pre-eminently a war conference, but it established peace — a peace which lasted for many years. At the same time its deliberations took the form of a general statute concerning river navigation, the rank of ambassadors, and the slave-trade. Criticise the Congress of Vienna as we may, its work was not only of fundamental importance but pointed the way to a better and brighter day.

Although it can not be denied that the Congress of Paris in 1856 was a war conference, its work was not wholly taken up with the issues of war. The Declaration of Paris, for example, was much more general and touched interests which, while involved in the conflict, were of wider importance than the immediate interests that led to the war or were safeguarded by the conclusion of peace. It is also true that the Congress of Berlin, in 1878, was a war congress, but it dealt particularly and largely with the Balkan Peninsula and set up a state of affairs which, while changed in part, is nevertheless the basis of order in Eastern Europe.

But alongside of these larger gatherings there were smaller meetings that have profoundly influenced the future. For example, an enthusiast in Switzerland interested countries in the treatment of sick and wounded, and produced the first Geneva Convention of 1864 — the Red Cross Convention, as we call it — to ameliorate the condition of the sick and wounded upon the field of battle. The convention did not come at the very end of a war; it was assembled by reason of the horrors of the war of 1859, between France and Italy against Austria. In 1868, the additional articles of the Convention of Geneva were drawn up in conference, and there was no immediate war that had caused the conference to assemble. The purport of these articles was to apply to naval warfare the principles of the Geneva Convention of 1864.

In 1868, the Czar of Russia, Alexander II., called a conference in order to consider whether or not the means of warfare might not be humanized; whether the use of certain instruments in warfare, or instruments of a certain kind, should be prohibited; whether bullets of a certain weight, of a certain explosive quality, should not be prohibited, and there was drawn up the Declaration of St. Petersburg. It is true that the declaration contemplated but was not preceded by a war.

The conference that met in Brussels in 1874 upon the invitation of the Czar, and which drew up a project of an International Declaration Concerning the Laws and Customs of War was not immediately preceded by a war, and although the project was not adopted by the powers represented, it was nevertheless the basis of the "Convention dealing with the laws and customs of war" framed by the First Hague Peace Conference. The Brussels Conference undertook the codification of the laws of war — and in so far it can not be considered a peace conference — but it furnished the precious precedent of an international statute.

The various congresses and conferences referred to were summoned by the rulers and nations of Europe, and both in their calling and in their results indicated an advance in public opinion. Public opinion, however, was not content to entrust itself wholly to nations and their rulers, but sought expression in individual and co-operative lines.

In 1873, the Institute of International Law was established at Brussels, composed of distinguished jurists and authorities on international law. Their purpose was not merely to study the problems of international law, but to advance the science by an appeal to reason. They considered the field of international law from the standpoint of theory and sought by example and precept to aid the codification of a rational system of international law. International law had thus a society whose proceedings should appear annually. It already had a journal, for in 1869 three enthusiasts, Rolin-Jaequemyns, Asser, and Westlake, established the Revue de Droit International et de Législation Comparée. The Institute met annually and issued its annual. The Review discussed scientifically and at length important questions of international law, and, little by little, the influence of the Institute and the Review extended beyond the immediate country of publication and beyond the language in which the proceedings and the articles were written. A great movement looking toward advance in international lines was begun, and in reality the call of the Czar for the great conference of 1899, the First Hague Conference, was simply, paradoxical as it may seem, the substitution of national or international effort for the individual or socialized effort of the founders of the Institute of International Law.

In 1898 the Czar Nicholas called the First Peace Conference, designed chiefly, it would seem, to free nations from the burden of the constantly increasing armament by bringing about disarmament. The circular astonished the diplomats; it was not favorably received in many quarters. Thereupon a new circular was prepared enlarging the scope, relegating disarmament to a less important position, but enlarging the scope of the program, or of the invitation, by including the consideration of various methods by which arbitration might be advanced and the peaceful solution of international difficulties made the rule. This second circular was much better received, and on the 18th day of May, 1899, the First Peace Conference of this modern world, without a war as its immediate cause, met at the House in the Woods at The Hague, for the purely academic consideration of very great and important international questions.

As an understanding of the work of the First Conference is necessary to an appreciation of the recent Second Conference, the results of the deliberations of the First Conference are briefly set forth.

The work, then, of this conference took shape in three great conventions. The first was the convention for the peaceful settlement of international conflicts, which convention established, first, the right of nations to offer their good offices and mediation without having the offer or mediation considered as an unfriendly act by either or any of the contending parties; second, a commission of inquiry to ascertain the facts of an international difficulty of great and serious importance, so that the facts involved might be found impartially by a commission composed of neutrals as well as nationals. We all recall the Dogger Bank incident in Admiral Rojesvensky's remarkable tour of the world. Japanese vessels were supposed to be lying in wait in the North Sea. The Russian squadron opened fire. It is not related that any Japanese vessels were sunk, but certain English fishing smacks were injured and lives were lost. It is difficult to appreciate the state of mind of the Russian admiral, because one would not expect to find Japanese cruisers in the North Sea, or if one did find such cruisers, the fact of their presence would be well known. However, the Russian authorities maintained that they felt the presence of the enemy, whether through a mistake of signaling or not; fire was opened and lives were lost. Were it not well established, this would be unbelievable; but it happened. And the next step was not an unbelievable one — the next step was war. Wars have arisen for less cause than that. The national honor of both countries was involved. Great Britain could not allow its subjects to be shot with impunity; Russia could not well consent to discipline its naval authorities without an investigation. Now, an investigation to be valuable must be impartial, must be conducted more or less by neutrals, and for the first time the provisions of the convention for the peaceful solution of international conflicts in the matter of commissions of inquiry were used. A report was made by this board finding the attack unjustified, and Russia settled the damages. Rulers of nations and their responsible governments often seek to avoid war but are frequently unable to do so. Therefore, this machinery was a God-send by which a bitter dispute between two countries concerning a matter of fact might be referred to an impartial board for examination and report. Without expressing any opinion, let me call your attention to the causes, at least to an incident, if it were not a cause, which preceded the Spanish-American War — the blowing up of the Maine in Havana Harbor. Was it blown up from within or without? An international board never considered the question. An American board did consider the question. The public passions were inflamed and we rushed headlong into war. If this international commission had existed at that time the President of the United States would have been in an intrenched position; for he could have insisted that this matter, being a question of fact, be submitted to a commission of inquiry ready for constitution under rules of procedure accepted by civilized nations. I can not say that the Spanish-American War would not have taken place. I am not a prophet either as to future events or as to events of the past; but I do maintain that those clauses would have made the outbreak of war much more difficult, and that, therefore, the establishment of a commission of inquiry is a great advance for the cause of peace.

Third, the convention for the pacific solutions of international conflicts provided a court of arbitration. Perhaps I would better say, provided for a court of international arbitration, because that court was to be created when the international controversy arose. Each nation was to select and appoint, and notify to a board created at The Hague, not more than four persons of good moral character and competent in international law. In case of a conflict each party was to select two from this list of judges. The judges were to elect their umpire, their presiding officer, or the nations were to provide otherwise for the selection of the umpire. In order that the tribunal thus constituted might be of service and in order that litigants might know the exact procedure to be followed before it, an elaborate system of procedure was drawn up and approved. Since the meeting of the First Hague Conference, four great and important cases have been submitted to the Hague Tribunal, have been adjudicated and the judgments cheerfully and promptly accepted by the litigating nations. Nations appeared before the bar as suitors and resorted to law instead of force. The court has not, however, been so successful as its framers hoped, largely because it is not a court permanently in session composed of judges or jurists acting under a sense of judicial responsibility. The fear of partiality in a court constituted by the suitors for a particular purpose, with judges chosen and paid by the litigants, would seem to account for the partial success, if not failure, of the institution.

The second great convention of the First Conference was the convention for the adaptation of the Red Cross to maritime warfare. That, of course, is a technical subject, but even the layman can see what a great advance it was to have the humane principles of the Geneva Convention of 1864 and the additional articles of 1868 applied to maritime warfare as well as land warfare.

The third great convention was the codification of the laws and customs of land warfare, which, composed by experts, assumed the proportions of an elaborate code. While based upon the Laws and Customs of War, adopted by the Conference of Brussels (August 27, 1874), the declaration of Brussels drew its life and spirit from Dr. Francis Lieber's Instruction for the Government of Armies in the Field, known in army circles as General Orders No. 100 of 1863. The United States may therefore claim not a little proprietary interest in this great convention of 1899.

Such is, in brief, the outline of the work of the First Hague Conference. Misunderstood at the time, subjected to ridicule by reformer as well as reactionary, the conference is now looked upon at once as the starting point and the center of international progress.

The work of the Second Conference, for which the year 1907 will be remarkable, was two-fold. First, it revised and enlarged the conventions of 1899 in the light of experience, in the light of practice as well as of theory, and put them forth to the world in a new and modified form. In the next place the conference did not limit itself to these subjects. To the three conventions of 1899, revised in 1907, were added ten new conventions. This simple statement shows the enormous field covered and the positive results achieved by the Second Conference within the comparatively short period of four months. Tried by the standards of results the conference clearly justified its existence; but it would have been a success had it demonstrated nothing more than the possibility of the representatives of forty-four nations to live in peace and quiet during four months. If it had done nothing more than to bring these representatives into close contact to learn to understand one another's needs by understanding one another, the conference would have been a success.

But we cannot content ourselves with a mere statement of results, for the conference must rise or fall not by the amount accomplished, not by the number of conventions negotiated and signed, but by their value and importance. As the various conventions, declarations, resolutions, and *voeux* of the conference have been incorporated in the Final Act and arranged in what seemed to the conference their order of importance, it appears advisable to discuss the various results of the conference in the order established by the Final Act. Perhaps a word of explanation is necessary as to the Final Act itself. It states the calling of the convention, enumerates the countries and their delegates taking part in the conference. But the Final Act is not a convention; it is rather a solemn statement of what was done, a summary or *résumé* of results indicated by the names and titles of the conventions, to be followed by the text in separate form.

The preamble of the Final Act states:

"The Second International Conference of Peace, proposed by the President of the United States of America, having been, upon the invitation of His Majesty the Emperor of All the Russias, convoked by Her Majesty the Queen of the Netherlands, met, on the fifteenth day of June, nineteen hundred and seven, at The Hague, in the Hall of Knights, in order to give a further and new development to the humanitarian principles which served as a basis for the first conference of 1899. The powers, hereafter enumerated, took part in the conference and designated as their delegates the following: Germany (arranged according to the French names of the countries), the United States of America," etc. The Final Act then continues: "In a series of reunions held from the fifteenth day of June to the eighteenth day of October, nineteen hundred and seven, in which the delegates have constantly been animated by the desire to realize in the largest measure possible the generous views of the August Initiator of the conference and the intentions of their Governments * * * ", the conference adopted "to be submitted to the signatures of the plenipotentiaries the texts of conventions and of the declaration hereinafter enumerated and annexed to the present act."

An examination of the text of the preamble of the Final Act clearly indicates that the conference was called by President Roosevelt. It is common knowledge that Russia was not in a position to call the conference during two eventful years. Time was slipping by and those who believed in conferences were anxious that a new conference should meet in order to take up the work outlined but left undone at the First Conference. Therefore, President Roosevelt sent a circular to the various powers outlining a program and requesting an expression of opinion as to the advisability of such a conference and assent to participation in it. The responses were favorable and it seemed not unlikely that the conference would meet under the auspices of President Roosevelt. However, a representative of Russia waited upon the President and requested that the initiative be transferred from the United States to the Czar, inasmuch as the Czar had called into being not merely the First Conference but the idea of the conference. With that chivalry which is characteristic of the President, he immediately yielded the initiative to the Emperor of Russia, the "August Initiator," as he is called, and the conference was convoked by the Queen of Holland upon the invitation of the Czar. The United States was, however, unwilling that only a part of the world should be represented. Appropriate steps were therefore taken for the admission of Latin America, and assent was obtained by diplomatic correspondence. Two of the three conventions of 1899 were open, that is to say, the non-signatory states were invited to sign, and upon signing, to assume the obligations and benefits under the conventions. The convention for the peaceful settlement of international conflicts was a closed convention and the assent of the powers was necessary in order that the Latin-American States might be permitted to sign. The reason for this was that while the powers represented at the First Conference were willing to arbitrate and to enter into certain relations with the states represented at the First Conference, they were unwilling to contract generally. As one of the delegates said at the second convention, he was unwilling to open his door to any newcomer who chose to knock. No objection was made, however, to the adhesion of the Latin-American States, and on the 14th day of June, 1907, consent to their adherence was formally given.

In all, forty-four states were represented at the conference and forty-four states answered the roll-call. Two states of Latin America were not represented, Costa Rica and Honduras. The former approved of the conference and adhered to the conventions of 1899, but was not represented. The absence of Honduras was explained by the recent revolution, which paralyzed its efforts. The restoration of peace led to an application to be admitted and the application was favorably acted upon. Delegates were appointed but they did not arrive in time to participate in the work of the conference.

Following then the order of the Final Act, the first is the convention for the pacific solution of international conflicts, the nature of which has been sufficiently explained.

It should be said, however, that the commission of inquiry was much enlarged in the light of the experience — experience gained in the Dogger Bank incident, previously referred to. The language of the convention was carefully revised, provisions were given greater clearness, and a few sections added on summary procedure. The great frame-work of 1899 was untouched; for the additions of 1907 do not change the nature of the structure, although the architects of 1907 would doubtless pronounce the additions to be undoubted improvements.

The neutral powers must make known to shipping by previous notice, the regions where automatic contact mines are to be moored. This notice must be communicated speedily, as urgent, to the governments through diplomatic channels.

Article 5. At the close of the war, the contracting powers engage to do everything in their power to remove, each for himself, the mines which it has placed.

As to anchored automatic contact mines which one of the belligerents has placed along the coast of the other, their situation shall be indicated by the power that has placed them to the other party and each power shall proceed in the shortest possible time to remove the mines which are found in its waters.

Article 6. The signatory states which are not yet provided with improved mines, such as are required by this regulation, and which consequently cannot actually conform to the rules established by articles 1 and 3, agree to transform, as soon as possible, their mines, so as to comply with the prescriptions mentioned above.

Article 7. The stipulations of the present regulation are concluded for the duration of seven years or until the end of the Third Peace Conference, if this date is prior.

The contracting powers engage to consider again the question of the use of submarine automatic contact mines six months before the expiration of the period of the seven years, in case it has not been again taken up and decided by the Third Conference of Peace at a previous date.

In the absence of the stipulations of a new convention, the present regulation shall continue in force, unless this convention is denounced. The denunciation shall not take effect (with regard to the notifying power) until six months after the notification.

It was sought, notably by Great Britain, to prevent any nation from placing submarine mines beyond its territorial waters, namely, the three-mile limit. It was objected to this that while the offensive use of mines might be limited, it was inadvisable, perhaps unreasonable, at the present time to limit the defensive use of mines. In one case the mines would be used as a means of attack; in the second place as a defense against aggression. The latter view commended itself to the conference, and, after much discussion, it was agreed not to introduce into the convention any provision upon the subject.

The ninth convention forbade the bombardment by naval forces of undefended harbors, villages, towns, or buildings. The presence, however, of military stores would permit bombardment of such ports for the sole purpose of destroying the stores, provided they were not destroyed or delivered up upon request. Notice, however, should be given of the intention to bombard. In like manner, the convention permitted the bombardment of such undefended places if provisions were not supplied upon requisition to the naval force. Bombardment, however, was not allowed for the collection of mere money contributions. It should be said that unoffending property was not to be bombarded or destroyed, and buildings and institutions devoted to a religious, scientific or charitable purpose were expressly excluded from attack.

This convention will undoubtedly subserve a useful purpose and clear up a doubt which seems to have existed. The weight of opinion forbade the bombardment of undefended ports. The fear, however, that such ports might be attacked and held, in order to enforce submission, rendered a convention on this subject, even although declaratory of international usage and custom, of no little moment. We all remember the Spanish-American war and the constant fear, however unfounded, that the Atlantic Coast might be bombarded by the Spanish fleet.

The tenth convention adapted to maritime warfare the principles of the Geneva convention of 1906. It is not necessary to describe this admirable document in detail. We are familiar with the Red Cross and its work, and there exists absolute unanimity of opinion that the sick and wounded upon the battlefield or upon the high seas should be cared for, irrespective of nationality. Humanity demands it and this demand has been carefully complied with. A word of history may, however, be permitted. The first Geneva convention, dealing with land warfare, was drawn up in 1864. The additional articles of 1868, extending the principles of land warfare to naval warfare, failed of adoption. In 1899 the additional articles were made the basis of a convention dealing with this question adopted at the First Hague Convention. Warfare, however, had changed since 1864 and it was felt that the provisions of the Geneva Convention of 1864 should keep pace with the changed conditions, so in 1906 the Geneva Convention of 1864 was revised and the present conference adapted the provisions of this revised convention of 1906 to naval warfare. It is not necessary to enlarge upon the importance of this convention. We understand it and are proud of the progress it marks, in succoring the sick and the wounded and mitigating in their extreme rigor the evils necessarily incident to war.

The eleventh convention relates to certain restrictions in the exercise of the right of capture in maritime war. It is a modest document, but is all that was saved from the wreck of the immunity of private property. The American delegation urged the abolition of the right of capture of unoffending enemy private property upon the high seas, but great maritime powers such as Great Britain, France, Russia and Japan were unwilling to relinquish this means of bringing the enemy to terms. A convention negotiated by powers having no great maritime interest might be a moral victory; it would not be of practical importance except as embodying in conventional form the advanced and radical views of this subject. But to return to the present convention. Chapter 1 frees from capture mail upon a vessel if not directed to or coming from a blockaded port. Chapter 2 frees from capture fishing smacks devoted solely to coastal fishing and small vessels engaged in local navigation. It is pleasing to note that the conference made the basis of its action the decision of the Supreme Court of the United States in the well-known case of The Paquette Habana, 1899, 175 U. S. 677. Chapter 3 regulated the legal condition of the crew of an enemy merchant vessel by providing that subjects of neutral states were exempt from capture and that subjects of the enemy state were likewise exempt from capture, provided they gave an oath not to serve during the continuance of the war. These provisions are indeed modest when we consider the vast subject involved. They are, however, humaritarian, and therefore to be commended.

The twelfth convention sought to establish an international court of prize, and there only remains the ratification of this convention by the contracting powers in order to call into being this great and beneficent institution. For years, enlightened opinion has protested against the right of belligerents to pass final judgment upon the lawfulness of the capture of neutral property, and it is a pleasure to be able to state that the interests of the neutrals in the neutral prize are henceforward to be placed in the hands of neutral judges with a

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representation of the belligerents, in order that the rights of all concerned may be carefully weighed and considered.

It is understood that Norway intended to present a project for the establishment of a court of prize. It is a fact that both Germany and Great Britain presented a project for the establishment of a prize court at the first business session of the conference. The projects, however, were widely divergent. In one, the continental idea prevailed; in the other, the Anglo-Saxon idea dominated. It was impossible to convince either of the advantage of the other plan. Matters were at a standstill, when the American delegation, through Mr. Choate, proposed a basis of compromise which, accepted by both, resulted in the establishment of the court.

The provisions of this convention are technical and detailed as must be the case in which an institution is to be created and its jurisdiction and procedure defined within the compass of a single document. It is impossible, therefore, to discuss it at any length, but it would be an unpardonable omission if mention were not made of its salient features. In the first place, national prize courts are to officiate as in times past. One appeal is allowed from a national court to a higher court of the captor's country. Thereupon, at the expiration of two years an appeal may be taken directly from the national court and the case transferred from the national court to the international prize court at The Hague. This court thereupon becomes seized of the law and the facts involved in the case and the decision pronounced becomes final and binding upon the litigant parties.

It should be stated that while the prize court is chiefly a court for nations instead of for individuals, still the individual suitor, unless expressly prohibited by his country, may himself appeal and transfer the case, should his country be indisposed to appear before the bar as his representative. It may not be inappropriate to state that the institution of the court is in itself a recognition of the fact that the individual is not without standing in modern international law.

In discussing the matter of the prize court, President Roosevelt aptly said, in his recent message:

Anyone who recalls the injustices under which this country suffered as a neutral power during the early part of the last century can not fail to see in this provision for an international prize court the great advance which the world is making towards the substitution of the rule of reason and justice in place of simple force. Not only will the international prize court be the means of protecting the interests of neutrals, but it is in itself a step towards the creation of the more general court for the hearing of international controversies to which reference has just been made. The organization and action of such a prize court can not fail to accustom the different countries to the submission of international questions to the decision of an international tribunal, and we may confidently expect the results of such submission to bring about a general agreement upon the enlargement of the practice.

The thirteenth convention concerns and seeks to regulate the rights and duties of neutral powers in case of maritime war. This is an elaborate codification of the rights and duties of neutrals in which the conference essayed to generalize and define on the one hand the rights of neutrals and the correlative duties of the belligerents, and in the second place to set forth in detail the duties of neutrals, thus safeguarding the rights of belligerents in certain phases of maritime warfare. The belligerents are forbidden to commit hostilities within the territory or the territorial waters of neutrals and are forbidden to make a neutral port or neutral territory the basis of naval operations. The neutral is likewise forbidden to permit such conduct; the belligerent is forbidden to equip, provision, or to procure ammunition for a war-like purpose within neutral ports, and the neutral is required to prevent such use of its territory. The enemy men-of-war are forbidden to remain beyond a certain period in neutral harbors. If vessels of the other enemy be present, the order in which the vessels shall leave is prescribed, so that hostilities may not begin within neutral jurisdiction. There are other and important provisions in the convention which aim to codify existing custom, with the addition of provisions thought to be necessary or highly desirable. The result, however, was unsatisfactory to some of the larger maritime powers, which prefer their present regulations on the subject of neutrality or which were unwilling to accept the modifications proposed. The United States was not satisfied with certain provisions of the convention and reserved the right to study the project in detail before expressing a final opinion. It therefore abstained from voting and signing.

The fourteenth convention is a re-enactment of the declaration of 1899 forbidding the launching of projectiles and explosives from balloons. The original declaration was agreed to for a period of five years, and as this period had expired the powers were without a regulation on the subject. The re-enactment provided that the present declaration shall extend, not merely for a period of five years, but to the end of the Third Conference of Peace. It is difficult to say whether the declaration is important or not. It is, however, evidence of the fact that the conference believed that land and water offer a sufficient field for warfare without extending it to a newer element, the air.

Such is, in brief, the content of the fourteen conventions, including a declaration, previously enumerated. The Final Act then passes to the less formal results: "The conference, inspired by the spirit of compromise and reciprocal concession which pervades its deliberations, adopted the following declarations which, reserving to each of the represented powers the benefit of its votes, allows them to affirm the principles which they consider as unanimously recognized.

> It is unanimous: (1) In accepting the principle for obligatory arbitration; (2) in declaring that certain differences, and notably those relating to the interpretation and application of international conventional stipulations, are susceptible of being submitted to obligatory arbitration without any restriction.

It was a matter of great regret to the thirty-two powers voting in behalf of a general treaty of obligatory arbitration, against which there were only nine votes recorded, that the opponents of this great and beneficient measure stood upon the rights of the minority to block the will of the majority; but as Germany and Austria refused to yield to the majority, and as an attempt to sign a special convention dealing with the subject, to be binding only on those who voted for it, would have created bitterness of feeling within and without the conference, it was deemed in the interest of international peace and good understanding to adopt the principle in the abstract without seeking to incorporate it in the concrete form of a convention. The future, however, is very bright. There is no reason to prevent the thirty-two powers from negotiating individual and separate treaties and thus accomplish indirectly and beyond the confines of The Hague what might and would have been accomplished but for the determined opposition of two great but unconverted powers.

In the next place, to continue the reading of the Final Act, the conference adopted unanimously the following resolution:

> The Second Conference of Peace reaffirms the resolution adopted by the conference of 1899 regarding the limitation of military charges, and considers that these military burdens have considerably increased in almost all the countries since the last date. The conference declares that it is especially to be desired that the governments should undertake again the serious study of this question.

The friends of peace regarded the failure to limit the burden of armaments as a misfortune. There is much, however, to be said for the haste that makes slowly. The problem of disarmament or limitation of armaments is a very serious one. It is much more serious than the pacifists would have us believe. Shall all disarm at one and the same time? If that were possible we could solve the question at once; but the fear that some may not disarm while others do, and the further fear that the large powers have not really lost the appetite for the weaker, must make one pause. Germany consented to the passage of the resolution, Great Britain supported it, and, in accordance with direct instructions from the Secretary of State, the American delegation voted for the measure.

The Final Act then proceeds to enumerate five recommendations, the first and last of which should be discussed.

> The conference recommends to the signatory powers the adoption of the project hereunto annexed of a convention for the establishment of a court of arbitral justice and its putting into effect as soon as an agreement shall have been reached as to the choice of the judges and the constitution of the court.

The project referred to as annexed and made a part of the recommendation is a careful convention consisting of thirty-five articles, providing for the organization, jurisdiction and procedure of a permanent court of arbitration, composed of permanent judges, versed in the existing systems of law of the modern civilized world. The conference was unable to agree upon the precise method of appointing the judges for the court, but recommended that this court be established upon the basis of the project approved by it and annexed to the recommendation as soon as the signatory powers should agree upon the method of appointing judges. The number of powers necessary is not specified, nor is the number of judges determined, as in the court of prize. It therefore follows that any number of powers may agree to make the project the basis of the court and the court is established. It would thus seem that we are in the presence of the realization of centuries of hope.

The fate of the court was long in suspense. The opposition to it was bitter at times. It was more difficult to carry than the prize court, because there was no international court of prize whereas there is a permanent court of arbitration — The Hague Court — although permanent in name only and constituted from a list of judges for each case submitted to it. The existence, however, of the permanent court made it more difficult to establish the new one, and it was not until the last day but one of the conference that the project was adopted and referred to the powers by the unanimous vote of the nations present and voting. Perhaps it would be advisable to quote the first paragraph of the project in order that the exact nature of the court may be evident. It is as follows:

> In order to further the cause of arbitration, the contracting powers agree to organize, without injury to the permanent court of arbitration, a court of arbitral justice, free and easy of access, composed of judges representing the juridical systems of the world and capable of assuring the continuity of arbitral jurisprudence.

It is proper to state that the project was essentially an American project, although presented conjointly by Germany and Great Britain, and the establishment of the court in the near future will be an American triumph. President Roosevelt, in his recent message to Congress, commented as follows upon this recommendation:

> Substantial progress was also made towards the creation of a permanent judicial tribunal for the determination of international causes.

There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The conference recommended to the signatory powers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges should be selected. This remaining unsettled question is plainly one which time and good temper will solve.

I believe you will search in vain for any work of a more far-reaching nature accomplished within the past centuries. The dream of Henry IV, the hope of William Penn, both of whom prepared projects for a court of nations, seem, if not wholly to have been realized, within the very grasp of our generation.

The friends of peace and arbitration had wished to make the conference at The Hague a permanent institution, meeting at regular and stated intervals known in advance. The American delegation had the honor to urge the adoption of such a resolution or recommendation and succeeded in substance, although the language is not so clear and crisp as one would like to see it. The exact wording of the recommendation follows:

> Finally, the conference recommends to the powers the reunion of a third peace conference to take place within a period analogous to that which has elapsed since the preceding conference (eight years) at a date to be fixed by common agreement among the powers, and the conference call their attention to the necessity of preparing the program of the Third Conference far enough in advance in order that its deliberations may take place with indispensable authority and rapidity.
>
> In order to reach this end, the conference considers it very desirable that two years before the probable reunion of the conference a preparatory committee be charged by the governments with the duty of collecting the different propositions to be submitted to the conference, of discovering matters susceptible of future international regulation, and of preparing a program which the governments shall determine so that it may be attentively studied in each country. This committee shall propose a mode of organization and procedure for the conference.

The meaning of this recommendation is obvious. Whatever power may call the conference, the interested governments are to prepare the program and devise rules for the organization and procedure of the conference. In other words, the conference ceases to be Russian in becoming international.

Enough has been said to show that this conference, which lasted four months, and which was subjected to criticism in all parts of the world and to misrepresentations in the journals, has not only justified its calling but that it is a landmark in international development.

Our great concern must be, as far as possible, to humanize war as long as war exists. The greater task is to remove the causes of war so that nations may not be hurried into war, or that friction, developed by the failure to solve or adjust conflicts, may not permit nations slowly but surely to drift into war.

Leaving out minor matters, this conference did four things.

1. It provided for a meeting of a third conference within an analogous period, namely eight years, to be under the control of the powers generally, instead of the control of any one of them.

2. It adopted a convention for the non-forcible collection of contract debts, substituting arbitration and an appeal to reason for force and an appeal to arms.

3. It established a prize court to safeguard neutrals, and

4. It laid the foundations of, if it did not put the finishing stone to, a great court of arbitration.

James Brown Scott.

# CONVENTION FOR THE PEACEFUL ADJUSTMENT OF INTERNATIONAL DIFFERENCES[1]

The First Hague Conference had as its main object a consideration of a "possible reduction of the excessive armaments which weigh upon all nations," or, at least, a discussion of the possibility of "putting an end to the progressive development of the present armaments."[2] The conference early realized that even a limitation of the increase of military and naval expenditure was impracticable at that time, and devoted its chief energies to the secondary purpose for which it was called, viz., to discuss and devise "the most effectual means of insuring to all peoples the benefits of a real and durable peace."[3]

Among the specific proposals contained in Count Muravieff's circular letter of January 11, 1899, was one "to accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations; to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them."[4]

The result of the deliberations of the third committee — the most important commission of the conference — was the Treaty of Arbitration, or convention for the peaceful adjustment of international differences, of 1899, consisting of sixty-one articles. Of these, seven articles related to the use of good offices and mediation, six were concerned with international commissions of inquiry, and fifty-two were devoted to international arbitration proper. "In questions of a judicial character, and especially in questions regarding the interpretation of international treaties or conventions," arbitration was recognized as "the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods."[5]

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[1] Professor Hershey was present at the Second Hague Conference as correspondent of the *New York Evening Post* and the *Boston Evening Transcript*. — MANAGING EDITOR.

[2] The Czar's Rescript of August 24, 1898.

[3] *Ibid.*

[4] Holls, Peace Conference, p. 8.

By far the most important of these provisions were those which established the Hague Tribunal, or Permanent Court of Arbitration, and regulated its procedure. But it was a court permanent in name only and a panel or list of judges rather than a court. Its procedure and mode of organization were very defective, and its importance lay rather in what it held out by way of promise for the future than of actual achievement. But it was nevertheless a great step in advance; for it provided governments with a list of judges and a procedure ready at hand for the settlement of such differences as they might choose to submit to arbitration, thus rendering it "unnecessary for them to enter into long and tedious negotiations respecting the selection of arbitrators or the settlement of the mode of procedure upon the occasion of each and every controversy.[6]

Although very few cases have thus far been submitted to the Hague Tribunal, its creation has greatly stimulated the negotiation of treaties of arbitration between nations with agreements to submit some or all disputes to its jurisdiction. And perhaps this has been the greatest single result of the First Hague Conference.

But arbitration is not the sole or even chief mode of settling international differences. Diplomacy is ever at work healing wounds, arranging compromises, adjusting claims, and preventing friction. And recent experience during the Russo-Japanese war has shown that there are also great possibilities in mediation and international commissions of inquiry.

The signatory powers in 1899 declared in favor of good offices or mediation, as far as circumstances permit, both before and during hostilities, and defined the duties and functions of the mediator. They also recommended the application, when circumstances allow, of special mediation in the following form:

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[5] Article 16 of the Arbitration Treaty of 1899.

[6] See an article by the writer in the *New York Independent* for September 13, 1906.

> In case of a serious difference endangering the peace, the states at variance shall each choose a power to whom they intrust the mission of entering into direct communication with the power chosen by the other side, with the object of preventing the rupture of pacific relations.
>
> During the period of this mandate, the term of which, unless otherwise stipulated, can not exceed thirty days, the states in conflict shall cease from all direct communication on the subject of the dispute, which shall be regarded as having been referred exclusively to the mediating powers, who shall use their best efforts to settle the controversy.
>
> In case of a definite rupture of pacific relations, these powers remain charged with the joint duty of taking advantage of every opportunity to restore peace.[7]

It is a matter of regret that this form of special mediation, which is based upon the use of seconds in duelling, was not tried upon the outbreak either of the South African struggle or the Russo-Japanese war; but there can be no doubt that it was in pursuance of the recommendations contained in article 3 that President Roosevelt induced negotiations which resulted in the Treaty of Portsmouth[8] in 1905. This article read:

> Independently of this recourse [*i. e.,* recourse to the good offices or mediation of one or more friendly powers to avert hostilities],[9] the signatory powers consider it to be useful that one or more powers who are strangers to the dispute should, on their own initiative, and as far as circumstances will allow, offer their good offices or mediation to the states at variance.
>
> The right to offer good offices or mediation belongs to powers who are strangers to the dispute, even during the course of hostilities.
>
> The exercise of this right shall never be regarded by one or the other of the parties to the contest as an unfriendly act.

If the convention of 1899 for the peaceful adjustment of international differences thus furnished our President with the means of initiating negotiations which terminated one of the greatest wars of modern history, another great war was narrowly averted by means of an institution suggested by this same convention.

Article 9 of the Treaty of Arbitration provides:

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[7] Article 8 of the Arbitration Treaty. This article was drafted by Mr. Holls, secretary of the American delegation.

[8] Hershey, The International Law and Diplomacy of the Russo-Japanese War, pp. 347–348.

[9] See Article 2 of the Arbitration Treaty of 1899.

> In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on matters of fact, the signatory powers consider it useful that parties who have not been able to come to an agreement by diplomatic methods should, as far as circumstances allow, institute an International Commission of Inquiry to facilitate a solution of these difference by elucidating facts, by means of an impartial and conscientious investigation.

Article 14 declared, however, that "the report of the International Commission of Inquiry shall be limited to a statement of the facts, and shall in no way have the character of an arbitral award."

When public anger and excitement in England had been inflamed to the fighting point as the result of what appeared to be a wanton and deliberate attack by the Russian Baltic fleet upon innocent fishermen at Dogger Bank in October, 1904, both the Russian and British Governments, in spite of the fact that a question of honor seemed involved, proposed an international commission of inquiry analagous to that recommended by this convention. It is true that the North Sea Commission, which conducted the North Sea inquiry in conformity with this agreement, was given a scope more extended than that originally contemplated, and this combined the functions of a commission of inquiry and a court of arbitration;[10] nevertheless the credit for suggesting the application of this idea on a large scale belongs to the First Hague Conference.

Although the excellence of the work of the *Comité d'Examen* of the third committee of the Hague Conference of 1899 (which framed the Arbitration Treaty, or convention for the peaceful adjustment of international differences) was generally admitted, additions were freely suggested, and it was felt in some quarters that it needed radical correction and revision. The organization and procedure of the Hague Tribunal was generally held to be defective, and many believed that a new permanent court of arbitration, composed of salaried, impartial, and independent judges, should be instituted.

There was also a strong and growing sentiment in favor of obligatory arbitration in a large number of cases — a plan which had been advocated by Russia, but was rejected on the motion of

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[10] Hershey, *op. cit.*, ch. 8, *passim*.

Germany at the First Hague Conference. Mr. W. T. Stead and the other "militant" peace advocates favored making special mediation and commissions of inquiry obligatory, with an interval of at least thirty days' compulsory peace prior to the outbreak of hostilities. Mr. Stead also demanded a so-called league of peace, with a system of international financial boycott and persecution of peace breakers.

Acting upon the suggestions of Mr. Richard Bartholdt and William Jennings Bryan, the Interparliamentary Union, at its London session in 1906, adopted a resolution favoring "an investigation of all questions in dispute between nations or a resort to mediation prior to the commencement of hostilities."[11]

Among the Russian proposals of April, 1906, which formed the main basis or program for discussion at the Hague Conference of 1907, were: "Improvements to be made in the provisions of the convention relative to the peaceful settlement of international disputes as regards the Court of Arbitration and international commissions of inquiry." These matters were referred to the committee on arbitration, with M. Bourgeois as president. This commission, which held its first meeting on June 22, 1907, was divided into two sub-committees — the first to confine itself to mediation, commissions of inquiry, and arbitration in general, and the second to consider the projects for an international high court of appeal for the final adjudication of maritime prizes. The actual work of the first subcommittee, except that relating to the establishment of a permanent court of arbitral justice, was performed by two *Comités d'Examen* designated as *Comité A* and *Comité C*.[12]

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[11] Among the World's Peace Makers, by Hayne Davis, page 180.

[12] The first committee, designated as Comité A, and placed under the presidency of M. L. Bourgeois, was composed of Baron Marschall and Mr. Kriege, for Germany; General Porter and Mr. Scott for the United States; Mr. Drago for the Argentine Republic; Mr. Mérey de Kapos-Mère and Mr. Lammasch for Austria-Hungary; Baron Guillaume, reporter, for Belgium; Mr. Ruy Barbosa for Brazil; Baron d'Estournelles de Constant and Mr. Fromageot for France; Sir Edward Fry for Great Britain; Mr. Streit for Greece; Count Tornielli, Mr. Pompilj, and Mr. Fusinato for Italy; Mr. Esteva and Mr. de La Barra for Mexico; Mr. Lange for Norway; Mr. Asser for the Netherlands; Mr. d'Oliveira

The result of the labors of these committees was a revised Arbitration Treaty, or convention for the peaceful adjustment of international differences, which was indeed based upon that of 1899, but which consisted of ninety-four articles instead of sixty-one, and comprised a number of additions and corrections.

In order to pass judgment upon this portion of the work of the Second Hague Conference, it will be necessary to compare the conventions of 1899 and 1907, with a view of ascertaining their main points of similarity and difference.

The first article remains unchanged. It reads:

> With a view to obviate, as far as possible, recourse to force in the relations between states, the contracting powers agree to use their best efforts to insure the pacific settlement of international differences."

The seven articles (arts. 2–9) on good offices and mediation also remain unchanged, except that, on motion of Mr. Choate, the words *and desirable* were added to the word *useful* in the first paragraph of article 3. This paragraph now reads:

> Independently of this recourse, the contracting powers consider it useful *and desirable* that one or more powers, strangers to the dispute, should, on their own initiative, and as far as circumstances will allow, offer their good offices or mediation to the states at variance.

The conference has been criticised[13] for failing to make a delay of thirty days and special mediation as recommended in article 8[14] compulsory; but a little reflection should convince one that the duties of a mediator are too delicate and the situation at such times is usually too critical to be controlled by the rude hands of force. Besides, it is extremely doubtful whether the suggestion was a practical one; for " two prospective belligerents have seldom, if ever,

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for Portugal; Mr. de Martens for Russia; Mr. Milovanovitch for Servia; Mr. de Hammarskjöld for Sweden; Mr. Carlin for Switzerland.

The other committee, designated as Comité C, was placed under the presidency of Mr. Fusinato; it was composed of Mr. Kriege, Mr. Scott, Mr. Lammasch, Baron Guillaume, reporter; Mr. Fromageot, Sir Edward Fry, Mr. Crowe, Mr. Lange, and Mr. d'Oliveira. A third committee (B) considered the establishment of a court of arbitral justice.

[13] By Mr. W. T. Stead in *Le Courrier de la Conférence* for July 4, 1907.

[14] For the text of this article, see *supra*, p. 31.

reached the same stage in their military or naval preparations at the same time. It is not probable that Von Moltke, who informed Bismarck that he was ready for war on July 13, 1870, would have been willing to give France thirty days during which to complete the mobilization of her army. Japan was ready to attack the Russian fleet at Port Arthur on the evening of February 8, 1904. Is it likely that she could have been induced to give the Russians another month during which to transport more troops to Manchuria?"[15]

The delegation from Haiti suggested a modification of article 8 with a view of securing an impartial mediator, viz, that the two powers selected by the parties at variance choose a third power to act in that capacity. But this proposal was evidently founded upon a misunderstanding of the real character of mediation, and it was unanimously rejected by the committee.[16]

The convention of 1907 devotes twenty-eight articles (arts. 19–37) to commissions of inquiry instead of the six articles of the convention of 1899. The additional articles relate mainly to matters of organization and procedure.

After much deliberation it was decided to leave article 9 intact,[17] except for the addition of the phrase *and desirable* after the word *useful*. An amendment proposed by Haiti that, as in the case of arbitration and mediation, "the signatory powers may equally suggest to the parties in controversy recourse to international commissions of inquiry," was rejected for the same reasons that the Haitian proposal regarding special mediation had been set aside.[18] This action was most unfortunate. It was apparently based on a failure to distinguish between the two Haitian propositions, which were wholly dissimilar in character and import.

The discussion turned mainly on the Russian proposal to substitute the term *agree* for the words *consider useful* and to grant to commissions of inquiry the right to fix responsibility as well as elucidate facts.

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[15] Citation from the writer's letter to the *New York Evening Post* for June 15, 1907.

[16] On the Haitian proposition, see M. le Baron Guillaume's Report, pp. 5 and 201, and *Le Courrier de la Conférence* for July 9, 1907.

[17] See *supra*, p. 32.

[18] See the Report of M. le Baron Guillaume, pp. 6 and 202.

The text of the Russian proposal was as follows:

> In differences of an international nature involving neither honor nor *independence,*[19] and arising from a difference of opinion on matters of fact, the signatory powers *agree,* if circumstances allow, to institute a commission of inquiry to facilitate a *peaceful* solution of these differences by elucidating the facts *and fixing responsibilities, in case there are any,* by an impartial and conscientious investigation.[20]

The eminent Russian jurist, M. de Martens,[21] argued repeatedly and at length in favor of these changes. He did not insist upon the word *responsibilities,* nor wish to make recourse to commissions of inquiry obligatory; but he desired to render their use easier and more frequent, and maintained that the wording of the article as agreed upon was extremely defective. He pointed out that the conference had failed to draw adequate profit from the teaching afforded by the experience of the North Sea Commission of Inquiry which met in Paris in January, 1905 — a commission which not only investigated the facts, but also passed upon the questions of responsibility and degree of blame, in connection with the North Sea incident.

But the Russian jurist was unable to convince his colleagues of the first commission, who seemed to fear that the acceptance of these enlightened views would tend to render the use of commissions of inquiry compulsory. The main opponents of the Russian proposition appear to have been Count Tornielli, of Italy, Sir Edward Fry, Baron Marschall von Bieberstein, of Germany, Turkhan Pacha, and M. Beldiman, of Roumania, the leader of the opposition to commissions of inquiry in the Hague Conference of 1899.[22]

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[19] In the Russian draft the word *independence* is substituted for the phrase *vital interests.*

[20] For the Russian text, see Baron Guillaume's Report, p. 195. The additions and variations of the Russian draft have been placed in *italics.* There is also an important omission of the phrase "parties who have not been able to come to an agreement by diplomatic methods."

[21] For the views of Professor de Martens on commissions of inquiry, see the Report of Baron Guillaume, pp. 6–7; Première Commission, troisieme séance, pp. 3–4; *Le Courrier de la Conférence* for July 10, 1907; and Holls, *op. cit.*, pp. 206–210.

[22] *Le Courrier de la Conférence* for July 10, 1907; and Holls, *op. cit.*, pp. 210–214.

Although it is true, as claimed, that sovereign states are in no wise bound by the apparent limitations of article 9, yet it is to be feared lest some of the powers may interpret it to mean that recourse to such commissions in cases which involve questions of so-called national honor or vital interests are forbidden by the convention, or at least that such recourse may be discouraged to some extent. There seems to be no valid ground for the timid or conservative attitude of the conference on this subject. On the contrary, "the successful application of this method at a time of great public passion and excitement shows that it is particularly well adapted to meet crises or emergencies. It would also seem to be an appropriate means for securing a calm consideration of those questions which are supposed to affect the honor, dignity, and vital interests of a nation and which, it is held, are not proper subjects for arbitration. A calm and impartial inquiry into the facts gives time for passions to cool and for conservative tendencies and sober second thought of the nation to assert themselves. If, as has been claimed, war is sometimes due to modern or 'yellow' journalistic methods, it would give the newspapers a chance to sell their successive editions without actually precipitating war." [23]

The remaining articles relating to commissions of inquiry deal with matters of organization and procedure and need not be considered here in great detail. As in the convention of 1899, it is stipulated that "international commissions of inquiry shall be constituted by special agreement between the parties at variance." This agreement shall specify the facts to be examined; it may determine the procedure to be followed, the extent of the powers of the commissioners, the languages to be employed, the place of sitting, etc. (art. 10). If the special agreement does not indicate the place of meeting, the commission shall sit at The Hague. If it does not determine the languages to be employed, these shall be decided upon by the commission (art. 11).

As article 11 of the convention of 1899 declared that "unless otherwise stipulated, the international commissions of inquiry shall be formed in the manner fixed by article 32," so article 12 provided that they shall be formed in the manner determined by articles 45 to 57 of the convention of 1907.[24]

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[23] From the writer's letter to the *New York Evening Post* for June 15, 1907.

Article 13 is a reproduction of article 35 of the convention of 1899. It provides that "in case of the death, resignation, or absence for any cause, of one of the members of the Commission of Inquiry, his place shall be filled in the manner provided for his appointment."

Article 14 was inspired by article 37 of the convention of 1899. It declares that "the parties shall have the right to appoint special agents to represent them and to serve as intermediaries between them and the commission," and authorizes them to employ counsel for the defense of their interests.

Article 15 prescribes that "the International Bureau of the Permanent Court of Arbitration shall serve as the record office for commissions which sit at The Hague;" but if "the commission sits elsewhere than at The Hague, it shall appoint a general secretary" for this purpose (art. 16).

Article 17 declares that "with a view of facilitating the institution and operation of commissions of inquiry, the contracting powers recommend the following rules which shall be applicable to the procedure of such commissions in so far as the parties do not adopt other rules."

These rules are contained in articles 18–35. They are purely optional and largely based upon the experiences of the North Sea Commission. They provide for the securing and furnishing of information; the securing and interrogation of witnesses and experts; and prescribe the duties of agents and counsel. The deliberations and sessions of the commission are to be and remain secret, and the reports of proceedings and all documents bearing upon the inquiry shall not be published unless with the consent of the parties and the commission. The report of the commission is, however, to be read in public session in the presence of the agents and counsel of the parties concerned. Every decision shall be by a majority vote, but the report shall be signed by all members of the commission. If one of the members refuses to sign, mention of this fact shall be made. Such refusal shall not, however, invalidate the report.

[24] See *infra*, pp. 41–45.

Article 18 prescribes that the commission itself shall regulate the details of procedure which have not been provided for either by the special convention or inquiry or the present convention.

Article 35 reproduces the limitations of article 14 of the convention of 1899, which asserted that "the report of the international commission of inquiry shall be limited to a statement of the facts, and shall in no wise have the character of an arbitral award." As stated above,[25] this direction was not observed by Great Britain and Russia in their institution of the North Sea Commission, which combined the functions of court of arbitration with those of a commission of inquiry.

The Russian delegation had proposed the following modification of article 35:

> The powers at variance, having obtained knowledge of the ascertainment of facts and responsibilities as declared by the international commission of inquiry, are free either to conclude an amicable arrangement or have recourse to the Permanent Court of Arbitration at The Hague.

This proposal seems to have been rejected by Committee A on the ground that it implied obligatory arbitration as a necessary consequence of recourse to commissions of inquiry, whose use it would thus tend to discourage.[26]

In this matter, again, the leaders of the conference appear to have exhibited undue timidity and conservatism. It is difficult to see how the principle of obligatory arbitration was necessarily involved; even had this been the case, it need not necessarily have been a fatal objection to the Russian proposition.

The most important part of the convention for the peaceful adjustment of international differences is that portion relating to international arbitration, which consists of fifty-four articles, divided into four chapters under the head of Title IV.

Chapter I on "Arbitral Justice" consists of articles 37–41. Article 37 combines articles 15 and 18 of the convention of 1899. It now reads:

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[25] See *supra*, p. 36.

[26] Baron Guillaume's Report, p. 19.

> International arbitration has for its object the determination of controversies between states by judges of their own choice, upon the basis of respect for law.
>
> Recourse to arbitration implies the obligation to submit in good faith to the decision.

Article 16 has been called the corner-stone of the convention of 1899. It was around this article that the various propositions, regarding obligatory arbitration, naturally grouped themselves. It read:

> In questions of a judicial character, and especially in questions regarding the interpretation of application of international conventions, arbitration is recognized by the signatory powers as the most efficacious and, at the same time, the most equitable, means of deciding controversies which have not been settled by diplomatic methods.

Except for the substitution of the phrase *contracting powers* for *signatory powers* — a substitution which is made in every instance where this expression is used in the convention of 1907 — article 16 of the convention of 1899 remains intact, as article 38 in that of 1907. On the motion of M. de Mérey, of Austria-Hungary, the following paragraph to article 38 was added:

> Consequently, it would be desirable that, in differences upon questions of the kind above mentioned, the contracting powers should have recourse to arbitration, in so far as circumstances may allow.

Articles 17 and 19 of the convention of 1899 were retained as articles 39 and 40 without any modification. The contracting powers reserve the right to arbitrate any kind of controversy or enter into general or special agreements with a view to extending arbitration to any or all cases which they consider suitable for such submission.

Chapter II on "The Permanent Court of Arbitration" consists of articles 41 to 51. Articles 41 and 42 are a reproduction of articles 25 and 21 of the convention of 1899. They provide for the maintenance of the "Permanent Court of Arbitration established by the First Peace Conference." This court shall be "accessible at all times," and shall have "jurisdiction of all cases of arbitration, unless there shall be an agreement between the parties for the establishment of a special tribunal."

Article 43, which corresponds to article 22 of the convention of 1899, prescribes the main duties of the Internatural Bureau at The Hague. " It shall serve as the record office for the court and as its medium of communication. It shall have the custody of the archives and conduct all the administrative business."

Article 44, which almost literally reproduces article 23 of the convention of 1899, provides for the selection by each contracting power of " not more than four persons of recognized competence in questions of international law, enjoying the highest moral reputation, and disposed to accept the duties of arbitrators. The persons thus selected shall be enrolled as members of the court, upon a list which shall be communicated by the Bureau to all the contracting powers. * * * " Their term of appointment is for six years, subject to renewal.

Article 24 of the convention of 1899 stipulated that

> whenever the signatory powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators selected to constitute the tribunal which shall have jurisdiction to determine such difference, shall be chosen from the general list of members of the court. If such arbitral tribunal be not constituted by the special agreement of the parties, it shall be formed in the following manner: Each party shall name two arbitrators, and these together shall choose an umpire. If the votes shall be equal, the choice of the umpire shall be intrusted to a third power selected by the parties by common accord. If an agreement is not arrived at on this subject, each party shall select a different power, and the choice of the umpire shall be made by the united action of the powers thus selected. The tribunal being thus constituted, the parties shall communicate to the Bureau their decision to have recourse to the court, and the names of the arbitrators. The Tribunal of Arbitration shall meet at the time fixed by the parties. The members of the court, in the discharge of their duties, and outside of their own country, shall enjoy diplomatic privileges and immunities.

The above provisions have, with a few slight additions, been incorporated into articles 45 and 46 of the convention of 1907. But one paragraph has been modified and a new one added:

> Each party shall name two arbitrators of whom only one may be a national or chosen from among those who have been designated by it as members of the Permanent Court.

If, after a delay of two months, these two powers have not been able to come to an agreement, each of them shall present two candidates taken from the list of members of the Permanent Court (these not being nationals of either of them), beyond the members designated by the parties. It shall determine by lot which of the candidates thus presented shall be the umpire:

Article 48 contains what is perhaps the most unique and interesting innovation in the entire convention for the peaceful adjustment of international differences. Article 27 of the convention of 1899 had asserted that "the signatory powers consider it their *duty,* in case a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court of Arbitration is open to them." Much was hoped from this declaration of the powers proposed by France, and Mr. Holls was of the opinion that "next to the establishment of the Permanent Court of Arbitration this article undoubtedly marks the highest achievement of the conference."[27] But it remained practically a dead letter and, so far as the writer is aware, the only applications which have been made of article 27 have been by President Roosevelt in Latin American affairs.

In order to encourage and facilitate the arbitration of grave political controversies, the Peruvian delegation proposed that in case of a controversy between two powers one of them may address to the International Bureau of The Hague a note declaring that it is disposed to submit the difference in question to arbitration. "This note shall also indicate the point of view of the power making the declaration as to its rights in the matter. The International Bureau shall communicate this declaration to the other power, and place itself at the disposition of both powers in order to facilitate an exchange of views between them leading to a mutual agreement."

A similar proposition was made by the Chilean delegation, which, however, aimed to avoid the imposition upon the International Bureau of the duties of obligatory mediation — a function for the exercise of which it was not designed. The Chilean proposition simply provided that "the International Bureau shall immediately communicate the above declaration to the interested government. It shall also communicate this declaration, as also the reply thereto, to the signatory government of the present convention."

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[27] Holls, Peace Conference, p. 269.

The Peruvian proposal, as amended by Chile, was warmly supported by the delegations from France, the United States, Great Britain, Russia, and Brazil; but opposed by Germany, Austria, Belgium, and Greece. As a result of this discussion, the following paragraphs were finally added to the "duty" sections of article 48.

> In case of controversy between two powers, one of them may always address to the International Bureau a note declaring that it is disposed to submit the difference to arbitration.
>
> The Bureau shall immediately communicate this declaration to the other powers.[28]

It remains to be seen whether article 48 of the convention of 1907 will meet with a more cordial reception than did article 27 of the convention of 1899. There are undoubtedly great possibilities in it even in its present modified form, if properly and extensively applied. In commenting upon this innovation, Baron d'Estournelles de Constant says: [29]

> Thanks to America, a very important article was voted, article 48, which authorizes governments, in case of disputes, to address the Bureau of The Hague directly and demand or propose arbitration. This mechanism has not even been noticed by the press,[30] and yet it will be amply sufficient to put all the resources of arbitration in motion. Previously, where two states had a ground of quarrel they were obliged to agree together to submit the question to arbitration. And such an agreement between two governments whose relations have become envenomed is almost impossible. To-day it is in the power of one of them to make its offer openly, and thus force the second state to accept or decline that offer in presence of public opinion. It is a very great progress, although it may appear almost imperceptible, and henceforth a state that sincerely wishes to avoid war can reply to its aggressor: *"I appeal to the judges at The Hague."*

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[28] Baron Guillaume's Report, pp. 25–26, 176, 218, 219; *Le Courrier de la Conférence* for October 2, 1907; Holls, *op. cit.*, pp. 267–269.

[29] In the *New York Independent* for November 21, 1907.

[30] This statement is not quite accurate, for a commendation of the Peruvian proposition by the writer appeared in the *New York Evening Post* for July 27, 1907.

There is another phase of the matter which deserves consideration. The federation of the world is often regarded as a mere vision of poets or a dream of philosophers. But it may be observed that in the Hague Tribunal, or Court of Arbitration, we actually have, albeit in rudimentary form, a world judiciary; in the system of periodical Hague conferences, we have at least the rude beginnings of a world legislature; and in the International Bureau at The Hague, we may in time discover the germ of a world executive.[31]

Article 49 relates to the duties of the permanent Administrative Council, which is composed of the diplomatic representatives of the contracting powers accredited to The Hague. This Council is charged with the establishment and organization of the International Bureau, which remains under its direction and control. This article replaces article 28 of the convention of 1899, of which it is almost an exact copy. But it provides that nine instead of five members shall constitute a quorum. The duties of this Council and Bureau relate principally to the operation of the Hague Tribunal, for which it serves as a medium of communicating with the contracting powers.

Article 29 of the convention of 1899 provided that "the expenses of the Bureau shall be borne by the signatory powers in the proportion established for the International Bureau of the International Postal Union." In view of the large number of new adhering powers, it was deemed equitable to add to article 50 of the convention of 1907, the following paragraph:

> The expenses charged to the adhering powers shall be counted from the date of their adhesion.

Chapter III on "Arbitral Procedure" consists of articles 51 to 86 and need not be considered in great detail. They correspond to articles 30 to 58 of the convention of 1899 and, like these, are purely optional.

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[31] In an article entitled "The Coming Peace Conference at The Hague," published in the *New York Independent* for September 13, 1906, the writer called attention to the importance of appointing a "permanent committee to sit during the interim [*i. e.*, between successive conferences] in order to watch over international interests, *to use its influence in behalf of peace* and the enforcement of law, and report upon desirable changes, or improvements in international law at the meeting of the following congress or conference." This suggestion was scarcely noticed at the time.

Article 31 of the convention of 1899 provided that "The powers which resort to arbitration shall sign a special act (*compromis*) in which the subject of the difference shall be precisely defined, as well as the extent of the powers of the arbitrators. This act implies an agreement by each party to submit in good faith to the award." This article was entirely recast in article 52 of the convention of 1907 and two new articles (articles 53 and 54) added. Article 52 contains very specific directions as to what matters shall be included in the special agreement (*compromis*). Article 53 declares that the Permanent Court is competent to conclude such an agreement if the parties are in accord upon this point. It is equally competent, even if the request be made by only one of them (after a failure to come to an agreement by diplomatic methods) in certain cases.

The question of the choice of languages gave rise to some discussion in committee. Article 38 of the convention of 1899 authorized the Hague Tribunal to decide upon the choice of languages, but Germany and Russia were of the opinion that the parties themselves should decide this matter. Article 61 was finally edited to read:

> If the agreement has not determined the languages to be employed, the tribunal shall decide.

Article 37 of the convention of 1899 left it to the absolute discretion of the parties to employ such agents and counsel as they wished. This freedom seems to have been abused by some of the parties in employing as counsel members of the Hague Tribunal itself, thus inviting severe criticism in some quarters. In view of this danger, the German amendment to article 62 was adopted:

> Members of the Permanent Court can only exercise the function of agents, counsel, or advocates, in behalf of the power which has named them members of the court.[32]

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[32] A Russian amendment proposed to prohibit the practice altogether. It had the support of Great Britain and the United States. See Baron Guillaume's Report, p. 36.

The question of the publicity of discussions does not seem to have given rise to any debate. In 1907 as in 1899 it was provided that "they shall be public only in case it shall be so decided by the Tribunal, with the assent of the parties" (art. 66). Of course it is expected that publicity will be the rule. To the declaration of article 51 of the convention of 1899 that "the deliberations of the tribunal shall take place with closed doors," article 78 of the convention of 1907 adds, "*and remain secret.*" Every decision is to be by a majority vote. The provision (in article 51) that "the refusal of a member to vote shall be noted in the official minutes" was suppressed in article 78.

The requirement of article 52 that "the arbitral award must be drawn up in writing and signed by each member of the tribunal," as also the permission granted to those voting in the minority to state, in unity, the grounds of their dissent, were also suppressed in article 79; but the provision that "the arbitral award shall be made by a majority of votes, and accompanied by a statement of the reasons upon which it is based," was retained.

Articles 53 and 54 of the convention of 1899 remain unchanged in that of 1907. Articles 80 and 81 prescribe that the award which is to settle the dispute finally and without appeal shall be read in public in the presence of the agents and counsel of the litigants. Article 82 is altogether new. It declares that "Every difference, which may arise between the parties concerning the interpretation and execution of the award, in so far as not forbidden by special agreement, shall be submitted to the tribunal that made it."

The Russian delegation asked for the total suppression of article 55 of the convention of 1899, which lays down the conditions under which the parties may reserve the right to demand a rehearing of the case. These are the "discovery of new facts, of such a character as to exercise a decisive influence upon the judgment, and which at the time of the judgment were unknown to the tribunal itself and to the parties demanding the rehearing." This condition must be established by a decision of the tribunal itself.

In 1907, as in 1899, M. de Martens argued strongly against the retention of article 55 on the ground that an arbitral award should terminate, finally and forever, the conflict between litigants. He maintained that a rehearing must necessarily provoke new discussions, again inflame public passion, and once more menace the peace of the world.

On the other hand it was urged that the right to revision is essential to liberty; that the sole end of arbitration is not the termination of the dispute; and that "nothing is settled until it is settled right."[33] The result of the discussion was an overwhelming vote in favor of the retention of article 55 as article 83 of the convention of 1907.

Article 84 reproduces with slight variations article 56 of the convention of 1899. Its first paragraph provides that "the arbitral award is merely obligatory for the litigant parties." Article 85 (article 57 of the convention of 1899) prescribes that "each party shall bear its own expenses and an equal part of the expenses of the tribunal."

Chapter IV on "Summary Procedure of Arbitration" is wholly new and consists of five articles (86–90). These were based upon a project presented by the French delegation which was designed to aid in the solution of disputes of a special or technical character by furnishing the parties with tribunals and a mode of procedure more simple, rapid, and less expensive than that elaborated in the previous chapter. They are as follows:

ART. 86. With a view of facilitating the operation of arbitral justice in differences that permit of a summary procedure, the contracting powers agree upon the following rules which shall be observed in the absence of different stipulations, and under reserve, should the case arise, of the application of the provisions of Chapter III which are not contrary to them.

ART. 87. Each of the parties at variance shall name an arbitrator. The two arbitrators thus designated shall choose an umpire. If they are unable to come to an agreement upon this subject, each shall present two candidates taken from the general list of members of the Permanent Court (none of them being nationals of any of the states selecting them) beyond the members indicated by each of the parties themselves. It shall be determined by lot which of the candidates thus presented shall be the umpire.

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[33] For the arguments *pro* and *con*, see the Report by Baron Guillaume, p. 42; *Le Courrier de la Conférence* for August 25, 1907; and Holls, *op. cit.*, pp. 286–303.

The umpire shall preside over the tribunal, which shall render its decisions by a majority of votes.

ART. 88. In default of previous agreement, the tribunal, as soon as it is constituted, shall fix the period within which the two parties must submit to it their respective memoires.

ART. 89. Each party shall be represented before the tribunal by an agent who shall serve as intermediary between the tribunal and the government that has selected him.

ART. 90. The procedure shall be exclusively in writing. Each party shall have, however, the right to demand the presence of witnesses and experts. The tribunal, on its side, shall have the power of requiring oral explanations from the agents of the two parties, as also from the experts and the witnesses whose presence it considers useful.

Seven articles (91 to 97, inclusive) of "Final Provisions" replace the four articles (58 to 61) of "General Provisions" of the convention of 1899. They include the customary provisions relating to the date, place, and mode of ratification; the means by which nonsignatory or nonadhering powers may become parties to the convention; and the conditions under which withdrawals may take place.

The convention for the peaceful adjustment of international differences, accompanied by a voluminous report drawn up by Baron Guillaume of Belgium, was submitted to the conference at its ninth plenary session on October 17, 1907, and adopted unanimously. There were, however, more or less important reserves on the part of Brazil, Greece, Japan, Switzerland, Turkey, and the United States.[34]

The reserve of the United States related to the Monroe Doctrine and was made with reference to article 48:

> Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign State. It is equally understood that nothing contained in the said convention shall be so construed as to imply the relinquishment, by the United States of America, of its traditional attitude toward purely American questions.

On the whole, the convention of 1907 must be pronounced somewhat disappointing even to many advocates of peace and arbitration who do not belong to the "militant" school of pacificists. Aside from its failure to agree upon a plan for obligatory arbitration or to adopt the American scheme for a real permanent high court of abritral justice or supreme court of the nations, it is to be regretted that the Second Hague Peace Conference did not see its way clear to recommend that third powers suggest recourse to commissions of inquiry in all cases of serious controversy regarding facts, that they did not make the use of such commissions obligatory, at least in certain cases, and give them the right to fix responsibility and apportion blame as well as to elucidate facts. It is also a matter for regret that the functions of the Administrative Council and International Bureau at The Hague were not enlarged to enable them to exert a more powerful influence in behalf of peace and the enforcement of law; and that the employment of members of the Hague Tribunal as agents or counsel was not absolutely prohibited.

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[34] *Le Courrier de la Conférence* for October 17, 1907.

On the other hand, some excellent results were obtained. Commissions of inquiry were provided with a form of organization and rules of procedure which, although purely optional, seem sufficiently detailed and adequate for their purpose. The rules of procedure suggested for the use of the Hague Tribunal were considerably enlarged and strengthened, and the functions of that body somewhat increased. Special tribunals with a more summary mode of procedure were devised for the settlement of disputes of a special or technical character. Most important of all, governments desiring arbitration of a given dispute are authorized by article 48 to appeal directly to the International Bureau at The Hague, which must immediately communicate this fact to the other power.

Surely these are important steps in advance and, taken collectively, constitute no small service to the cause of peace and arbitration.

Amos. S. Hershey.

# CONVENTION RELATIVE TO THE OPENING OF HOSTILITIES[1]

### ARTICLE I.

The contracting powers agree that hostilities between them should not begin without a previous unequivocal notice, which shall be either in the form of a declaration of war with reasons therefor, or of an ultimatum with a conditional declaration of war.

### ARTICLE II.

A state of war shall be made known without delay to the neutral powers, and shall not be effective with regard to them until they receive a notice, which may be given even by telegraph. However, the neutral powers cannot use the lack of a notice as a pretext if it should be proven beyond doubt that they really knew of the state of war.

The convention as drawn up is substantially the same as the proposition submitted by the French delegation — and that proposition follows in the main the text adopted by the Institute de Droit International at its meeting at Ghent (September, 1906), when the whole subject was carefully discussed.[2]

From the earliest times and in all stages of civilization we find the custom of declaring war before commencing hostilities. Certain primitive tribes which were in a constant state of feud may be said to have lived in a continual state of war, but when a more stable condition was reached where peaceable conditions were maintained the sentiment was also developed that hostilities ought not to be commenced without previous warning. In fact, without such a sentiment peace between two contiguous and jealous communities could not have lasted any length of time. The explanation which satisfied the minds of the chiefs may have been that any breach of peace in which the adversary was taken by surprise would be a sacrilegious violation of an oath; for peace was based on oaths sworn to the gods. The real reason, however, which gave rise to such a custom must have been the social necessity of some security in the relations between different communities and until such a custom had developed there would be no security from sudden attack, to guard against which the greater part of the communities' productive energy would be turned toward armament and guard duty. It is not unlikely that the reason may go still deeper. Sir Henry Maine, in seeking an explanation for the prohibition against the poisoning of sources, recognized as a rule of war from the dawn of history, thinks that perhaps the explanation is to be found in the feeling that a contest should be decided by the victory of the stronger in a fair fight.[3] If we carry further his suggestion, might we not be led to the conclusion that primitive society, depending, as it did, so much upon the fighting strength of the individual, would unconsciously tend to give its combined support to foster those conditions which should be most conducive to the survival and predominance of those most skilled in arms? If this be true no condition would meet with greater favor than the requirements of a fair fight and the avoidance of all taking by surprise. Another powerful motive for requiring a fair fight may have been to avoid the family feuds which would result from a death caused by a treacherous attack. The common recognition of the right of the stronger to predominate and destroy his opponent would in the case of killing in a fair fight obviate, in a great measure, the resentment which would follow a treacherous attack. Analogy would speedily make this principle one of the rules of intertribal intercourse, and any tribe which violated this principle would rouse its opponents to that frenzy of indignation which is the strongest guardian of all rules of law. If the force born of this frenzy were sufficient to overcome the tribe which had transgressed the rule, annihilation would probably be the penalty, and any tendency to repetition and the engendering of such a practice by that tribe would have disappeared; at the same time the example would long act as a lesson to deter others. It is equally true that only the weaker tribes would have been tempted to transgress the rule, and from that very fact the chances in favor of the annihilation of the transgressor would be the greater.

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[1] For the full text of the Convention with translation, see Supplement.

[2] Annuairé De l'Institute de Droit International, session de Gand 1906.

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[3] International Law, 2d ed., 1894, p. 135, "or it may have been the idea that poisoning was not fair fighting — and this shows itself as a very strong feeling in very ancient days — that on the whole each combatant ought to have the means of employing his skill in resistance."

All through the Middle Ages chivalry, itself the expression of the needs of the age, strengthened the influence of the principle of a fair fight, which of course has for its very foundation the idea of shunning all taking by surprise, but with the advances in civilization the brain power of the general and statesmen began to be more highly considered than the physical prowess of a Richard Cœur de Lion, and it quickly came to be felt that the organization of the state was fully as important as the physical strength of its citizens or the mere numbers of its armies. Improved weapons and gunpowder came to lessen still more the value of the fighting strength of the individual. All this has shaken to the very foundation that oldest of principles — that the strong man should have his way over the weaker. Public opinion began to recognize the necessity for the precedence of the thinker over the mere fighter. This was one of the causes for putting down duelling, which was no longer useful as a means of bringing to light leaders of physical prowess of which a former age had stood so much in need. Duels were likely now to destroy the most useful men. Examinations and degrees had begun to replace the wager of battle or the drinking bout. Other causes which contributed to do away with formal declarations of war were the reasons for entering into such wars. The royal marriages of Europe gave rise to many complications respecting the rival claims to territory — nothing more natural in such cases than for one of the claimants to invade the territory, and war would result without a declaration. Again, hate, due to religious differences, undoubtedly weakened the feeling of the existence of any set of rules common to Catholic and Protestant; but strongest of all must have been the growing feeling that the state must secure its victories at the least cost.

The constant fear of attack which accompanies the doing away with a declaration of war was no longer so destructive to the interests of society. In the case of great states with standing armies and fortified frontiers readiness for attack became the normal condition. The power to strike quickly and surely and the judgment of when to do so were the means at the disposal of the highly organized and powerful states. And among the powerful and warlike states which have in the past developed the rules of war there was, during a certain period, no desire to return to the old rule, necessitating a declaration. Within the shelter of the state's fortified frontiers citizens pursued their ordinary occupations, leaving to their government questions of war and foreign policy, but as soon as the rivalry of the great states began to change from military to commercial; as soon as the importance of striking first had become so magnified that a small military state of secondary importance could vanquish a more powerful state taken unawares; as soon as the progressive states found themselves utterly exhausted after the completion of even a successful war, the sentiment turned in favor of a declaration previous to the commencement of hostilities. The extent to which this sentiment is entertained, at the present day, varies from state to state. Those which have large fleets and standing armies ever ready to strike wish to retain this advantage, but yet they do not wish another state to commence war suddenly from the fear that it is itself about to be attacked. Hence it is that all agree that a declaration must be given.

During the discussion at The Hague some powers wished to fix an interval before which hostilities could not begin, and General den Beer Poortugael argued that it was strange to have no interval before passing from peace to war, when it was necessary to fix one in the less momentous renewal of hostilities after an armistice.[4] The cases are not parallel. At the moment of drawing up an armistice, it generally happens that neither side looks to gain any advantage from a sudden attack; also if no delay were given before the renewal of hostilities there could be no surprise, because each side would rest upon its arms. A stronger argument advanced by General den Beer, as well as others, is the desirability of doing away with the additional military burden on the powers, made necessary by being constantly on a war footing and ready to mobilize instantly. Here, as Mr. Renault says, in his truly remarkable report, is a practical opportunity of lessening the burdens of armament, but, he adds, the time is not yet ripe for such an advance.

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[4] Second commission; second subcommission; third session, July 12.

Every country will, then, in making a declaration of war, fix the interval, if any, which it shall deem best suited to its interests; but we must remember that public opinion has never given up those old ideas of the fair man-to-man fight, and the country which gives so short an interval as to take its adversary by surprise will, to its regret, find itself condemned the world over. The fear of becoming a stench in the nostrils of the nations will act as an incentive to make every government declaring war fix a fair interval.

Although the convention does not provide for an interval, it does stipulate that the declaration of war must give the reason necessitating a resort to arms. As Mr. Renault says:

> Governments ought not to employ such an extreme measure as a resort to arms without giving the reasons. Everyone, whether citizen of the countries about to become belligerents or of neutral powers, should know why there is to be a war in order to judge of the conduct of the two adversaries. This does not mean that we are to cherish the illusion that the real reasons for a war will always be given; but the difficulty of formulating reasons, the finding it necessary to give those which are without foundation or out of proportion to the gravity of war itself — all this will have the effect of attracting the attention of neutral states and of enlightening public opinion.

The first article of the convention offers an alternative form of declaration in the ultimatum which has the added advantage of fixing an interval, the reason for the war being made manifest in the refusal to comply with the conditions laid down. However, here again the demands contained in the ultimatum may have no real connection with the real cause in dispute. At the present time an ultimatum which demanded the performance of a particular act on the part of the adversary would be most likely to lead to war. So generally is this realized that the reasons for making the ultimatum would most probably be looked to rather than the demand it contained. Nevertheless, a state wishing to avoid giving its reasons for declaring war may prefer to give out an ultimatum containing some demand compliance with which it does not expect.

The Chinese military delegate was desirous of obtaining a definition of what constitutes war, his country having been upon several occasions in the past the object of military expeditions carried on by powers who maintained that they were not at war. Further, he asked if a declaration of war might be considered by the state against which it was directed as an unilateral act without effect.[5]

No one replied to those embarrassing questions. Governments are not loath to have the definition of what constitutes war shrouded in mystery; for in the greater number of states possessing a parliamentary form of government the deciding to make war is hedged about with formalities and special constitutional requirements, and governments have in the past and are likely in the future to find it convenient for reasons of domestic and foreign policy to resort to measures of war while maintaining that no war exists. But even were the powers desirous of defining war, the task would be most difficult, because it would have to be decided whether a pacific blockade was a measure of war and at just what point to draw the line separating reprisals from war.

However, China may rest assured that the country which declares war, even though it meet with no response, may apply to the country against which the declaration is addressed all the condition of regular warfare, and may avail itself of any or all of the effects, such as abrogation of political treaties, etc., which are among the consequences of a state of war.

During the discussion the delegates of certain countries[6] feared that an international convention respecting the declaration of war might be contrary to their constitutional provisions, but it was explained to the satisfaction of all that the proposed convention in no way affected the deciding for or against the entering into a war, but after the constitutionally competent body had in accordance with the constitutional provisions decided upon war it was for the executive or organ of the government charged with the conduct of its foreign affairs to declare the war. The convention only relates to this declaring of the war and not to deciding that it shall be declared.

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[5] Second commission; second subcommission; third session, July 12 (remarks of Colonel Tinge).

[6] Second commission; second subcommission; third session, July 12.

In the case of the United States, there might be a question as to whether a declaration of war by Congress in accordance with the provision of the Constitution was not a declaration from an international point of view; the transmission by the President of the declaration made by Congress to the adverse state being merely perfunctory. In the present state of confusion as to the extent to which provisions and organs of the Constitution are to be recognized internationally, it would be impossible to reach any definite conclusion. But as the President is Commander-in-Chief of the armed forces and no attack can be made until he gives the order, he certainly has the effective power of making the war; hence it would seem natural for him to have the power of declaring it, for were he to say he would not commence an attack before a certain date there would seem to be no constitutional objection, and practically war would begin at that date, though the Federal courts might consider abrogation of treaties and other effects of war to date from the declaration by Congress.

When one state declares war against another, giving an interval before the opening of hostilities, it goes without saying that the state against which war is declared may in turn declare war at once, or it may allow a shorter interval before the commencing of hostilities. But what if it make no rejoinder — may it begin hostilities at the expiration of the interval? Yes, because if attacked it would certainly defend itself, and the measures of defense necessary to its security must in some instances go to the extent of attacking the declaring state.

The second article of the convention, relative to the opening of hostilities, treats of the notification of the state of war to neutral powers and provides that they are not to be held responsible for the observance of neutrality until the receipt of such notice, or unless it be proven beyond a doubt that they did actually know of the existence of the war.

The Belgian delegation had proposed to fix an interval of forty-eight hours after receipt of the notification before the expiration of which period the notification should not affect neutral powers.[7] The intention was to give neutral states the necessary time to take measures for complying with the requirements of neutrality, but as this provision would seem to authorize violations of neutrality before the expiration of the interval, and as, furthermore, the interval required by one state would differ from that indispensable to another, it was thought best not to fix any. It remains, as formerly, entirely a question of fact as to whether the neutral, after learning of the existence of the war, did or did not maintain an attitude of strict neutrality and use due diligence in its enforcement.

And so humanity, developing in a spiral, has come again to require a declaration of war previous to the commencing of hostilities. We must not forget that this convention accepted by the plenipotentiaries of all the powers at The Hague modifies the law which existed previously, and that is a real piece of international legislation; it is drawn in the form of a convention, which can be denounced by giving a year's notice, yet there can be no doubt that it is intended to endure as long as war shall be.

ELLERY C. STOWELL.

## HISTORICAL EXTRACTS SHOWING WHEN HOSTILITIES BEGAN WITHOUT DECLARATIONS OF WAR.[8]

The year 1700 opened with profound peace, yet on March 12, without public declaration of war, 40,000 Saxons under General Fleming swept down before Riga, then belonging to Sweden.

In the month of December, 1700, French troops arrived by night and took possession of the strongest places in Spanish Flanders.

On July 28, 1701, Marshal Catinat, with a French corps d'armée, took possession of the Alpine passes and descended into Lombardy.

During the early part of the winter of 1701, Prince Eugene seized, without declaration of war, Canneto and other places in the territories of Guastalla, Parma, and Modena.

Throughout 1701 a naval war was carried on by England and Holland against France, but a formal declaration of war was not declared for several months after hostilities had been carried on.

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[7] Belgian Amendment to the French proposition; annexe 3a, second commission; second subcommission.

[8] House Report 754, p. 9, 52d Congress, 1st session.

In 1708 the Pope of Rome attacked by surprise a body of German imperial troops and ordered them cut to pieces with great barbarity; also,

In 1708, the English fleet suddenly appeared at Civita Vecchia and by surprise dictated terms to the Pope.

In 1714 the Turks, by sudden invasion, seized from Venice the Morea without declaration of war.

In 1715 England in peace seized Swedish provinces.

In August, 1717, during peace, a fleet of war vessels carrying 9,000 men left Barcelona secretly for Sardinia. Cagliari, the capital, was surrendered to the Spaniards.

In 1719 Spain secretly prepared an expedition and seized Messina and the greater part of Sicily.

The first case in the eighteenth century when declaration preceded war was in 1719, when France and England joined in war against Spain.

In 1726, without declaration of war, a British squadron under Admiral Hosin was sent to the West Indies and blockaded Porte Bello.

In 1727 Spain, at peace with England, laid siege to Gibraltar from February 11 to November 23.

In 1733 Russia invaded Poland without a declaration of war.

In 1739 reprisals preceded war between Spain and England. War was declared by England October, 1739.

1740, the first Silesian war.

1741, naval fights between France and England without declaration of war.

In 1742, without declaration of war, Naples, by action of an English admiral, forced to become neutral.

On June 27, 1743, the battle of Dettingen was fought, at which time no declaration of war had been made, nor was it made until March 20, 1744, when France declared war against England.

On August 9, 1744, Saxony and Bohemia were invaded by Frederick without declaration of war.

In 1747 sudden invasion of Holland by the French, in which the French secured all the advantages of sudden attack.

In 1754 France and England put forth hostile claims in America without declaration of war or notice. Fighting commenced between English and Virginia troops on the one hand and French on the other.

On May 17, 1756, England declared war on France.

In August, 1756, Frederick the Great suddenly invaded Saxony with 75,000 men. He did not publish a declaration until after crossing the frontier.

In 1759 the Dutch commenced hostilities in India against the English without proclamation of war.

In June, 1770, 1,700 Spanish soldiers and mariners, with five frigates and a train of artillery and ordnance stores, arrived at Port Egmont, when only two sloops of war and a miserable blockhouse with four guns constituted all the means of defense. Articles of capitulation were immediately concluded.

In 1777 Austrian troops numbering many thousands entered lower Bavaria and seized every important place, no declaration of war having been previously declared.

On February 6, 1778, France signed secretly a treaty with Franklin, engaging to give assistance to the American colonies. France did not then declare war upon England.

In 1779 Spain joined France in a war against England.

On April 21, 1784, Austria sent a detachment of troops into Dutch territories and took possession of Fort Lillo.

On December 20, 1787, before the declaration of war was issued, Austria sent six regiments into Turkey for the purpose of surprising the Turkish fortress Belgrade. Declaration of war was not declared until July 10, 1788.

In July, 1789, a Spanish frigate of twenty-six guns captured two English vessels and seized a settlement.

On April 20, 1792, France declared war against the Empire of Germany.

On September 28, 1792, the French Republic surprised Nice, Montalbon, and Ville Franche, in the Kingdom of Sardinia, during peace.

In the same year, without declaration of war, the French Republic ordered invasion of neutral Switzerland.

On July 1, 1793, France declared war upon England, Spain, and the Netherlands.

In 1795 England seized Dutch colonies, capturing the island of Ceylon without fighting, no declaration of war having previously been made.

In 1796 the French Republican army, without declaration of war, seized forts and territories of the States of the Church, Naples, Tuscany, Parma, Modena, etc.

On January 28, 1798, France suddenly invaded Switzerland. Naples moved against France, and France took possession of Navarra, Suza, and Coni. No declaration of war was made in any instance.

On September 5, 1800, Russia seized two British ships in Russian ports and sent their crews prisoners into the interior without declaration of war.

On July 14, 1801, reprisals were ordered by the English Cabinet. All Swedish, Danish, and Russian vessels in English ports were seized and a large English fleet under Sir Hyde Parker was dispatched to the Baltic, although there was no declaration of war.

On March 20 the Swedish inland steamer *Bartholomew,* wholly unprepared for any defense, surrendered at the first summons to a force of three regiments of foot and a detachment of artillery under Lieutenant-General Trigge and a squadron under Rear-Admiral Duckworth.

In 1802 Napoleon sent a force of 20,000 men into friendly Switzerland and seized by surprises Soleure, Zurich, and Berne.

On November 23, 1806, the Russian army, during negotiation and after full concessions, suddenly invaded Moldavia and seized Chotsim, Bender, and Jassi.

In 1806 England sent an expedition against Curaçao; her fleet suddenly entered the harbor, and Fort Amsterdam was assaulted and captured.

On March 6, 1807, England sent an expedition, during negotiations, into Egypt, and on the 21st of March the governor of Alexandria accepted terms of capitulation.

In 1807 the English man-of-war *Leopard,* fifty-two guns, demanded of the *Chesapeake,* an American frigate cruising off Virginia, the requisition of some English deserters on board the *Chesapeake.* The American captain denied the right of search, whereupon the *Leopard* fired a broadside, killing and wounding several Americans in time of peace.

In 1812 Napoleon, by sudden attack on troops of Kowno, declared war with Russia.

On June 18, 1812, the United States declared war against Great Britain. During the month of April previous, however, a general embargo was laid by Congress upon all vessels in the harbors of the United States for seventy days.

In 1815 Murat, King of Naples, attacked Austria without notice.

In 1816 Portugal invaded the Spanish possessions on the River Plate without explanation or previous declaration.

In 1818 the United States, during peace with Spain, seized Pensacola and St. Marks.

In 1821 the United States seized a French ship during time of peace.

In 1826 the King of Spain carried on hostilities against Portugal with willful falsehood without declaring war, but professing friendship.

During the same year England, without declaration of war on Spain, dispatched troops to fight the Spaniards.

In 1827 the Turkish fleet was destroyed by Russia, England, and France without warning of war.

In 1828 the Russo-Turkish war occurred. Hostilities on both sides preceded declaration of war.

In the same year France sent an expedition against the Turks in Greece and captured five fortresses.

In 1831, without declaration of war, Russia fired into, sank, and captured Greek ships and joined in a formal attack upon Poros.

During this same year a French admiral carried off the whole Portuguese fleet and converted reprisals into war. And the King of Holland pressed his troops into Belgium and in nine days crushed the Belgian forces.

On February 22, 1832, France sent a squadron with troops and captured Ancona by sudden surprise during absolute peace between France and Rome.

In 1834 the Spanish army, without notice, crossed the Portuguese frontier and, by a forced march, surprised and defeated the force under Don Carlos.

In 1835 the inhabitants of Texas raised the standard of revolt against the Mexican Government, and declared themselves independent.

During the year 1838, an invasion of Canada took place under circumstances described in the United States Congress as such "that the people were at war while their Governments were at peace."

On the 17th of April, 1840, the British ships of war in the vicinity of Naples commenced hostilities and captured a number of Neapolitan vessels, and an embargo was laid on all ports of Malta that bore the Sicilian flag.

In 1844 hostilities by France against Morocco commenced by Prince de Joinville on not receiving a satisfactory answer to an ultimatum.

On May 13, 1846, the Congress of the United States passed a resolution that, by virtue of the constitutional authority vested in them, declared that a state of war existed between the Republic of Mexico and the United States. The President in his message recited many and various acts of hostilities prior to any declaration of war.

In 1847 a revolutionary junta had been established in Portugal and was carrying on a war against the Queen. The war having dragged on for some time, England, France, and Spain agreed to interfere, but no declaration of war was made.

In 1848 the Italian insurrectionary war broke out; the King of Piedmont at once joined his armies to those of the Italians, and the war, from its nature, was carried on without any formal notice.

On April 25, 1849, the French General Oudinot entered citadel Civita Vecchia. The Roman Assembly protested in the name of God and the people against this unexpected invasion. A short time after there followed the siege and capture of Rome.

In 1850 and 1851 the United States waged the "unofficial" war against Cuba.

In 1853 and 1854 the Crimean war was waged. Hostilities preceded war as follows: The Russian Government seized the Danubian principalities.

On May 31 the order for the passage of the Pruth was passed.

On June 2, before it was known in London, orders were sent to English and French admirals to move up the Besike Bay.

On October 22 the English and French fleet, under orders from London and Paris, entered the Dardanelles in express breach of treaty of 1841.

On October 23 Turkey declared war upon Russia and crossed the Danube to expel the Russians.

In 1859 France and Italy against Austria. The Austrian Government alleged that the actual commencement of this war was on both sides (as between France and Austria) declared to be due to prior hostile acts, not words.

On May 5, 1860, Garibaldi sailed from Genoa with 2,000 troops to wrest Sicily from the King of Naples.

In 1863 war between Austria and Prussia on one side and Denmark on the other virtually commenced by the occupation of Holstein and Lauenburg by the troops of the two great powers.

In 1870 the war between France and Germany. The declaration of war clearly preceded war.

# THE AMELIORATION OF THE RULES OF WAR ON LAND

With a view to the systematic discussion of the questions inscribed upon its program, the membership of the conference was divided into four great committees, to each of which a related group of subjects was assigned for investigation with a view to the formulation of such stipulations as might be deemed worthy of insertion in a general convention. The second of these committees was charged with the investigation of all questions having to do with the operations of war on land. While it was assumed that the Second Committee would address itself to the amelioration of the existing rules and usages of war, as embodied in the convention framed by the First Peace Conference, it was also expected that considerable time would be devoted to the serious consideration of questions which, though they were not touched by the First Conference, were now believed to be ripe for conventional regulation. To that end the following subjects were formally assigned to the Second Committee at the second plenary session of the conference:

*a.* The modification and amelioration of the rules of war on land;
*b.* The opening of hostilities;
*c.* The declarations of 1899;
*d.* The rights and duties of neutrals on land.

At the same session the following officers were chosen by acclamation:

| | | |
|---|---|---|
| President: | A. Beernaert, | Belgium, |
| President-Adjoint: | T. M. C. Asser, | The Netherlands, |
| Honorary Presidents: | Baron Marschall de Bieberstein, | Germany, |
| | Gen. Horace Porter, | United States, |
| | Marquis de Soveral, | Portugal, |
| Vice-Presidents: | C. Brun, | Denmark, |
| | Samas Khan Momtas-Es-Saltaneh. | Persia, |
| | Alexandre Beldiman, | Roumania, |
| | Gaston Carlin, | Switzerland. |

The first meeting of the committee was held on June 22 in one of the council rooms of the Hall of the Knights, which had been set apart by the Government of the Netherlands for the use of the conference. The proceedings were opened by an address from President Beernaert, who had acted as president of the committee charged by the First Peace Conference with the preparation of a code of rules for the conduct of military operations on land. At this session the delegates of China and Switzerland announced the adhesion of their respective Governments to the convention of 1899 in respect to the laws and usages of war on land.

A proposition to apportion the work assigned to the committee among two subcommittees was adopted, and the following assignment of subjects was unanimously approved:

To the First Subcommittee, under the presidency of M. Beernaert:
- *a.* Modifications in the rules governing the operations of war on land;
- *b.* The declarations of 1899;

To the Second Subcommittee, under the presidency of M. Asser:
- *c.* The rights and duties of neutrals on land;
- *d.* The opening of hostilities.

Col. Eugene Borel, a distinguished officer of the Swiss General Staff, was charged by the committee with the exacting and responsible duties of rapporteur.

### THE OPENING OF HOSTILITIES

The convention concerning the opening of hostilities applies to naval operations as well as to land warfare. It was therefore made a separate convention. Nevertheless the matter is too closely connected with the convention for the rules of war on land to pass it by without remark in that connection.

At the first session of the Second Committee a paper was read by Major-General Yermoloff, the Russian military delegate, in which the attention of the committee was drawn to the important subject of hostilities without declaration. At the same session the following proposition was submitted by the delegation of France:

> I. The contracting powers acknowledge that hostilities between them ought not to begin without a previous and unequivocal warning, which shall take the form of a justificatory declaration of war, or of an ultimatum accompanied by a conditional declaration of war;
>
> II. Neutral powers should be advised without delay of the existence of a state of war.

Although it is well established that war is a question of fact rather than of intention, that a state of war dates from the commission of a particular act of hostility, and that the necessity for a formal declaration no longer exists, it was the view of the committee, and subsequently of the conference, that the subject proposed by the French delegation was not only worthy of serious consideration, but, on account of its important and far-reaching effects upon the relations of both belligerent and neutral powers, stood in need, in some degree at least, of conventional regulation.

It did not escape the attention of the delegation of the United States that a general proposition the effect of which was to restrict or modify in its exercise a power vested in Congress by the Constitution was one which exceeded the treaty-making power. For that reason it was deemed wise to submit the following declaration in behalf of the delegation, with a view to make clear the limitations which are imposed upon its activity in the Constitution of the United States:

> The delegation of the United States, while agreeing heartily with what has been said in respect to the opening of hostilities, thinks it desirable to invite the attention of the committee to the provision of the Federal Constitution which confers upon Congress the exclusive power to declare war, in the following terms:
>
> "The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."
>
> A power conferred by the Constitution is not susceptible of regulation or modification by law or treaty — in other words, it is independent of the legislative and treaty-making power. For that reason it is obvious that the delegates plenipotentiary of the United States find it impossible to support a proposition which is calculated to modify or diminish a power vested, by the Federal Constitution, in the legislative department of the Government.

> While this is true as to aggressive military operations, it is proper to say, however, that it has been the unbroken practice of the Government of the United States for more than a century to recognize in the President, as the Commander-in-Chief of the constitutional land and naval forces, full power to defend the territory of the United States from invasion, and to exercise at all times and in all places the right of national self-defense.

It was then announced, in behalf of the delegation of the United States, that it was willing to support a proposition, nonmandatory in character, favoring a formal declaration of intent to engage in hostilities.

After an exhaustive discussion of the matter from all points of view in which the important, and, to some extent, conflicting interests of both belligerents and neutrals were fully considered, the following text was approved by the committee and adopted by the conference:

> I. The contracting powers acknowledge that hostilities between them ought not to commence without a previous and unequivocal notice, which shall take the form of a justificatory declaration of war or an ultimatum accompanied by a conditional declaration of war.
>
> II. Neutral powers should be advised without delay of the existence of a state of war, which shall not be operative as to them until after the receipt of a formal notice, which may be given by telegraph. It is also understood that neutral powers may not take advantage of the absence of such notification if it be established, in an unmistakable manner, that they have actual knowledge of the existence of a state of war.

## MODIFICATION OF THE RULES AND USAGES OF WAR ON LAND

The history of the development of the rules of war on land has been traced in a former number of this JOURNAL.[1] As formulated in the convention of July 29, 1899, these rules have been subjected to the crucial test of application to the actual operations of modern war, under conditions calculated to develop any inherent elements of weakness which they were found to contain. It is a tribute to the high character of Dr. Lieber's work, and to the painstaking care which was given to its adaptation to the necessities of modern warfare, by the First Peace Conference, that it was found necessary to modify but eleven of the original articles, and to add but three paragraphs to the code as adopted by the conference of 1899.

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[1] I:13.

The amended articles will be discussed in their numerical order.

### ARTICLE 2

This article relates to the composition of the forces which may be employed in the conduct of military operations on land. An amendment was submitted by the delegation of Germany, which provided that the forces hastily organized by a state, with a view to resist a threatened invasion of its territory, should wear a distinguishing mark or badge, easily recognizable at a distance, the design of which should be formally notified to the opposing belligerent. After some discussion the amendment was withdrawn and a clause was adopted providing that such levies should carry arms openly and should respect the laws and customs of war in the conduct of their military operations, so that the amended article reads:

> ARTICLE 2. The inhabitants of an unoccupied territory who, on the approach of an enemy, spontaneously take up arms in order to repel the invading troops, without having had time to organize in accordance with article 1, shall be considered as a belligerent *if they bear arms openly and respect the laws and customs of warfare.*

Article 2, both in its original and amended forms, is conceived in the interest of those states which habitually maintain small permanent establishments, and who insist upon the right, at the outbreak of war, of employing a considerable portion of their arms-bearing population in the defense of their territory against invasion. It has been seen that the amendment embodies the requirement that forces so raised shall carry arms openly and shall conduct their operations in conformity to the accepted rules and usages of war.

### ARTICLE 5

This article contains those provisions of the code which are intended to regulate the internment of prisoners in time of war. *Internment* is a measure involving a minimum of restraint upon the freedom of movement of those who are subjected to its operation, and is the normal status of prisoners of war. *Confinement* is a more rigorous form of detention and, according to the terms of the article, can only be resorted to by a captor in a case in which such a measure of restraint is warranted by the conduct of a particular prisoner; as where there has been serious misconduct, repeated attempts to escape, violation of a parole given, or the like; or where a prisoner is held awaiting trial for a criminal offense. As amended by the committee the article reads: [2]

> ARTICLE 5. Prisoners of war may be subjected to internment in a city, fortress, camp, or other place, and may be required not to go beyond certain fixed limits. However, they shall not be confined except as an indispensable measure of safety, *and then only during the continuance of the circumstances which necessitate this measure.*

### ARTICLE 6

Two slight modifications are introduced in this article; one in paragraph 1 exempts commissioned officers from its general operation; the second, in paragraph 3, furnishes a more exact scale of compensation than was provided in the original article, so that the article now reads as follows:

> ARTICLE 6. A government may employ prisoners of war, *except officers,* as laborers, according to their grade or aptitude. The labor shall not be excessive and shall have no connection with the war operations.
>
> Prisoners of war may be permitted to work for the benefit of public departments or private parties, or for their own benefit.
>
> Labor performed for the government shall be paid for according to the schedules in force for soldiers of the national army performing the same labor, or, *if there is no such schedule, then at rates commensurate with the work performed.*

This change was made upon the representation of several delegates that the laws and regulations of the states which they represented made no provision for the compensation of prisoners of war for services rendered to the captor state, or to individuals or corporations with the consent of that government.

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[2] Changes in or additions to the text of the articles of 1899 are indicated in italics.

### ARTICLE 14

The requirements of article 14, in respect the bureau of information, have been found to some extent de ective; this for the reason that inadequate provision is made for he keeping of the records of individual prisoners of war, or fo the disposition of these records at the conclusion of peace. T s defect has been remedied by the following amendments:

> ARTICLE 14. A bureau of information regarding risoners of war shall be established in each of the belligerent states t the beginning of hostilities, as well as in any neutral countries whi may have received belligerents in their territory. This bureau shal answer all inquiries made concerning the prisoners, and shall receive fro the several branches of the service all data regarding internments, nsfers, *releases on parole, exchanges, escapes, entries into hospital deaths,* and other information necessary in order to prepare and kee up to date an individual descriptive card for each prisoner of war. *The bureau should keep on this card the matriculation number, name, , place of residence, grade, regiment or corps, wounds, date and plac of capture, date of internment, wounding or death,* as well as all speci entries. *Upon the conclusion of peace the descriptive card shall be de ered to the government of the other belligerent.*
>
> It shall also be the duty of the information bure to gather and keep together all articles of personal use, valuable pape letters, etc., which are found on the fields of battle or left behind by risoners *released on parole, exchanged, or escaping,* or dying in hospita or ambulances, and to transmit them to the interested parties.

The purpose of the foregoing amendments is to require the belligerent to keep an accurate record of each risoner of war in its hands, with a view to the completion of hi individual history in the proper office or bureau of the governme under whose flag he serves.

### ARTICLE 17

The original article involved an application f the principle of reciprocity, and provided that a commissioned ficer who occupies the status of a prisoner of war should receive ch portion of his monthly pay as was allowed by his own gove ment to prisoners of war in its custody. As there has been foun to be considerable variation in these rates of allowance, and as s e governments —

among them that of the United States — make no provision for such a case, it was deemed proper to allow pay to each officer at a rate corresponding to his rank and grade in the service of the captor; that government to be reimbursed for payments made to prisoners of war in conformity to the requirements of the conventional stipulation. As so modified the article reads:

> ARTICLE 17. *Officers who become prisoners shall receive the pay to which officers of the same grade are entitled in the country where they are being detained, the amount to be repaid by their government.*

ARTICLE 23

In this article a number of acts are described to which neither belligerent is permitted to resort in the conduct of his military operations. It was the well-understood purpose of the convention of 1899 to impose certain reasonable and wholesome restrictions upon the authority of commanding generals and their subordinates in the theater of belligerent activity. It is more than probable that this humane and commendable purpose would fail of accomplishment if a military commander conceived it to be within his authority to suspend or nullify their operation, or to regard their application in certain cases as a matter falling within his administrative discretion. Especially is this true where a military officer refuses to receive well-grounded complaints, or declines to receive demands for redress, in respect to the acts or conduct of the troops under his command, from persons subject to the jurisdiction of the enemy who find themselves, for the time being, in the territory which he holds in military occupation. To provide against such a contingency it was deemed wise to add an appropriate declaratory clause to the prohibitions of article 23:

> ARTICLE 23. Besides the prohibitions established by special conventions, it is particularly forbidden:
>
> * * * * * * *
>
> (h) *To declare extinguished, suspended, or barred the rights and choses in action of the nationals of the adversary.*

The experience gained in the practical application of the rules of war adopted by the conference of 1899 has made it apparent that the limitations imposed in that undertaki ; upon the authority of an invading belligerent, in the matter of re uiring services from the population of the territory in his milit y occupation, were not expressed with sufficient clearness to ass e to the population of the invaded district that immunity from e operations of war which it was the purpose of its framers to se ure.

With a view to apply a remedy to this st te of affairs, and to make clear the humane requirements of the iginal convention, a clause was adopted in committee with a view t impose an additional restraint upon the power of belligerents in t t regard. The new regulation is conceived in the following terms:

> *A belligerent is also prohibited from compell g the subjects of the adversary to take part in military operations aga st their country, even in case they were in his service before the commen ment of the war.*

### ARTICLE 25

This article, in its original form, forbade b ligerents to bombard towns, villages, dwelling places, or buildings vhich were not garrisoned or defended. The act forbidden was . bombardment with cannon of the types habitually used in fiel or siege operations. In view of the increased employment of ballo s in military operations, it was believed to be not only pruder but in the highest degree expedient, to give such an extension t terms as to include within the scope of the prohibition a possible esort to balloons, or airships, as agencies of aggressive attack. Th purpose was accomplished by adding the words "whatever be t e means employed," so that the amended article reads:

> ARTICLE 25. It is forbidden to attack or bom ird undefended cities, villages, dwellings, or buildings, *whatever be the eans employed.*

### ARTICLE 27

It is the purpose of the amended article secure to historical monuments the same measure of protection rom the vicissitudes of siege operations that is accorded to the classes of structures which are named in the original convention. o that end the proper terms of description have been inserted in the amended article, so that the clause now reads:

> ARTICLE 27. During sieges and bombardments all necessary measures should be taken to spare, as far as possible, buildings devoted to religious worship, arts, science, and charity, *historical monuments,* hospitals, and places of assembly of sick and wounded, provided they be not used at the same time for a military purpose.
>
> It shall be the duty of the besieged to designate these buildings or places of assembly by special visible signs which shall be made known beforehand to the besieger.

### ARTICLE 44

It has been seen that the substance of the prohibition, which was originally contained in this article, has already been embodied in article 23 of the amended code. As a result of the experience gained in recent wars it has been deemed best to forbid a belligerent, in somewhat more explicit terms, to resort to force or constraint with a view to compel the inhabitants of occupied territory to furnish information in respect to the positions, operations, or intended movements of their own army. With this end in view an appropriate regulation was adopted by the committee and approved by the conference. The new rule provides:

> ARTICLE 44. A belligerent is forbidden to compel the inhabitants of an occupied territory to furnish information concerning the army of the other belligerent or concerning his means of defense.

### ARTICLE 52

The article in its original form was intended to regulate the levying of requisitions in occupied territory of the enemy, and provided, in its last paragraph, that levies in kind should, as far as possible, be paid for in cash; if not paid for, the article contained the requirement that receipts should be given for property taken in the exercise of the belligerent right of requisition. The new paragraph contains the additional requirement that the property represented by these receipts shall be paid for with the least practicable delay, and the article as amended takes the following form:

ARTICLE 52. Requisitions in kind and services can only be levied on communes and inhabitants for the needs of the army of occupation. They shall be in accordance with the resources of the country and of such a character as not to oblige the inhabitants to take part in the war operations against their country.

These requisitions and services shall be levied only by authority of the commander in the locality occupied.

Supplies furnished in kind shall be paid for in cash as far as possible, otherwise they shall be verified by receipts *and the amounts due paid as soon as possible.*

### ARTICLE 53

This article, in its new form, enlarges to some extent the field of application of the original paragraph by bringing within its operation all means of communication of every kind which are intended for the transportation or conveyance of persons, property, or intelligence. The final paragraph forbids the destruction of submarine cables except in case of absolute and over-ruling military necessity. When such lines are taken and used, they are to be restored, with suitable indemnities, on the conclusion of peace. As amended, the article has been given the following form:

ARTICLE 53. An army occupying a territory may seize only the specie, funds, and bills receivable which are actually the property of the state, depots of arms, means of transportation, stores, and provisions, and, in general, all movable property of the government capable of being used in the military operations.

*All means used on land, sea, or in the air for the transmission of information or the transportation of passengers or freight*, except where governed by maritime law, stores of arms, and, in general, all kinds of munitions of war, may be seized even if they belong to private parties, but they must be restored and the indemnities shall be fixed upon the conclusion of peace.

ARTICLE 54. *Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in case of absolute necessity. They must also be restored and the indemnities adjusted upon the conclusion of peace.*

### FINAL ARTICLE

The following article was adopted by the committee and approved by the conference in plenary session with a view to its insertion as a final paragraph of the rules of war on land:

> The belligerent party who shall violate the requirements of those regulations shall be held to indemnity in a proper case. He will be responsible for all acts committed by persons forming a part of his armed forces.

It is one of the most essential rules of international good neighborhood that the states composing the family of nations shall be guided by the highest good faith in the execution of their treaty obligations. The rules of war of 1899 form no exception to this wholesome and necessary rule. It should be observed, however, that the several requirements of the undertaking are carried into effect, not under the immediate control and direction of the foreign offices of the signatory powers, but by military officers in the theater of hostile activity, each acting within the sphere of his command and duty in the military establishment of the belligerent under whose flag he serves. It is not surprising that differences of interpretation and of execution should have arisen in the application of the convention of 1899, or that undue severity should have been shown, from time to time, in the exercise of authority by subordinate commanders. To correct this dangerous tendency and give due emphasis to the well-established administrative principle that the state itself is responsible for the acts of its military commanders and subordinate agents, it was determined to add a concluding paragraph having some of the aspects of a penal clause. Its operation will be to require those charged by their governments with the exercise of high military command to maintain such a constant supervision over the acts of their subordinates as will be calculated to secure the exact and rigorous enforcement of the several requirements of the convention.

If the circumstances of a particular war are such as to suggest the application of a rule of limitation to cases arising under the article, such mutual stipulations in that regard as are warranted by the facts may properly find a place in the treaty of peace.

## THE DECLARATIONS OF 1899

The convention of 1899 contained three declarations. In the first the signatory powers agreed to forbid, for the period of five years, the throwing of projectiles and explosives from balloons. This declaration expired by its own limitation on July 29, 1904. The second declaration forbade the employment of projectiles having for their sole purpose to diffuse asphyxiating or deleterious gases. The third and last of the declarations forbade the use of small-arm projectiles "which expand or flatten easily in the human body — such as those having jackets which do not entirely cover the core or are provided with incisions." The last-named prohibition the United States declined to accept and that Government has never, by accession or adherence, become a party to its operation.

It will be observed that the declaration of 1899 on the subject of small-arm projectiles makes the prohibition to depend upon a particular injury to the tissues caused by a bullet having the mechanical construction described in the declaration. Other forms of bullet, of which there are a great number, some of which inflict wounds that exceed in cruelty those described in the convention, do not fall within the scope of the prohibition and, as the declaration contains no general terms of restriction, may be employed with impunity.

For that reason an amendment was submitted to the First Peace Conference, by General Crozier of the American delegation, which forbade the use of bullets "which inflicted wounds of needless or unnecessary severity; such, for example, as explosive bullets and, in general, every kind of small-arm projectile which exceeds the limit necessary for placing a man immediately *hors de combat.*" General Crozier's amendment, though lucidly explained and supported by the most convincing arguments, failed of adoption, and the declaration, in the form proposed by the subcommittee, was approved by the conference and inserted in the convention.

General Crozier's sound and well-considered views have been fully vindicated by the test of subsequent practical experience, and his reasoning has lost none of its cogency or force in the years which have elapsed since his amendment was rejected. Small-arm projectiles having the mechanical construction, or causing the wounds which are particularly described in the declaration, have ceased to be manufactured; and the forms now in use, some of which inflict wounds of great and unnecessary severity, are no longer within the narrow and illogical terms of the prohibition. Had the Crozier amendment been adopted, it is highly probable that a type of small-arm projectile would have been developed which would have met all reasonable requirements in respect to velocity, range, and flatness of trajectory, without the needless and inhuman laceration of tissues which attend those now in use, or which are proposed for adoption in the armies of some civilized powers.

Although the United States was not able to accept the declaration of 1899 in the form in which it appears in the convention, it has always regarded the restriction as an appropriate subject for conventional regulation, supplementing, as it does, the humane requirements of the St. Petersburg declaration of 1868.

The declaration of 1899, while conceived in a highly humane spirit, made the prohibition in respect to the use of small-arm projectiles to depend, not upon their effects upon the human body, or upon their efficiency in placing a man *hors de combat*, but, to some extent, upon their mechanical construction, and upon certain specific effects upon the tissues which were expressly stated in the declaration. It will be apparent that any restriction which it may be determined to impose, by treaty or otherwise, upon the use of certain small-arm projectiles should be logically conceived, clearly stated, and should be made to depend upon the wound occasioned by their use. In other words, it should be based upon the character and extent of the injury inflicted — upon the destruction of tissues rather than upon the mechanical construction of the projectile which causes the destruction.

It was believed that the time had come for the adoption of a sound and wholesome prohibition upon the use of small-arm projectiles the effects of which upon the human body are in excess of the requirements of civilized warfare. A government has the right to use a projectile which, by its shock of impact, will place an individual combatant *hors de combat*. So much of injury is lawful, but all injury in excess of the limit so imposed is unlawful, because it is cruel, inhuman, accomplishes no military purpose, and exceeds the standards of reasonable military necessity.

A proposition couched in the following language, which is identical with that used by General Crozier in 1899, was prepared, and printed and distributed in the manner prescribed by the rules governing the procedure of the conference and its committees:

> The use of bullets which inflict unnecessarily cruel wounds — such as explosive bullets and, in general, every kind of bullet which exceeds the limit necessary for placing a man immediately *hors de combat* — should be forbidden.

On the day set apart for the discussion of the declaration it was called up, but was ruled out of order by the president of the Second Committee on the ground that the amendment of the two declarations which were still in force was not included in the program, and upon the further ground that a treaty stipulation, in the form of a declaration, could only be amended at the suggestion of a power which had formally denounced it.

It was suggested to the chair that, as the United States had never become a party to the declaration, it was in substantially the same position, in so far as its amendment and adoption were concerned, as if it had adhered to the stipulation and had subsequently denounced it; but this suggestion was not accepted.

Formal exception was then taken to these rulings, but, as they seemed to have received the tacit approval of the delegates who composed the membership of the committee, it was not deemed expedient to appeal from the decision of the chair in respect to an interpretation of a conventional stipulation which would not have been reached by an application of any of the rules for the interpretation of treaties and statutes which are known to the common law. Had the question been submitted to discussion it is only too apparent that a conclusion would have been reached couched in terms as vague, uncertain, and barren of practical results as is the obsolete declaration in that regard of the conference of 1899.

George B. Davis.

# HAGUE CONVENTION RESTRICTING THE USE OF FORCE TO RECOVER ON CONTRACT CLAIMS

The convention of the Second Hague Conference respecting the subject of contract claims alleged to be due by one state to the subjects of another has a special interest to the citizens of the twenty-one American republics, particularly the first article of the convention, which reads as follows:

> Les Puissances contractantes sont convenues de ne pas avoir recours à la force armée pour le recouvrement de dettes contractuelles réclamées au Gouvernement d'un pays par le Gouvernement d'un autre pays comme dues à ses nationaux.
>
> Toutefois, cette stipulation ne pourra être appliquée quand l'Etat débiteur refuse ou laisse sans réponse une offre d'arbitrage ou, en cas d'acceptation, rend impossible l'etablissement du compromis, ou, après l'arbitrage, manque de se conformer à la sentence rendue.

## OBLIGATORY ARBITRATION

On its face the convention looks to invoke a definite advance toward obligatory arbitration, although it is not put forward in direct terms, as was the original Russian proposal at the First Hague Conference in 1899 regarding international arbitration, which provided:

> "Arbitration shall be obligatory in the following cases, so far as they do not affect vital interests or the national honor of the contracting states:
>
> "I. In the case of differences or conflicts regarding pecuniary damages suffered by a state or its citizens, in consequence of illegal or negligent action on the part of any state or the citizens of the latter.
>
> "II. In the case of disagreements or conflicts regarding the interpretation or application of treaties or conventions upon" certain specified subjects.

The First Hague Conference suppressed the proposals to make arbitration in any way obligatory. It set up an arbitration tribunal but gave to arbitration no definite jurisdiction. An arrangement was provided for the arbitration of differences, which left each state free to decide in each case whether it would invite arbitration, or, if invited, would accept it.

Somewhat superfluously the signatory powers in the First Hague Conference stipulated to "reserve to themselves the right to conclude * * * new agreements, general or special, with a view of extending the obligation to submit controversies to arbitration." The "epidemic" of arbitration treaties which followed the First Hague Conference showed the same hesitancy on the part of nations to give to arbitration a definite and unconditional jurisdiction. Of the fifty-odd treaties which were signed "with a view of extending the obligation" to arbitrate, only three or four made this method of redress obligatory upon the contracting powers. With these three or four exceptions, no definite subjects of international dispute were unconditionally segregated for settlement by arbitration. Each state reserved for its own decision, whenever a question of difference should arise, whether the particular question should be submitted. If at such time, which would ordinarily be a time of more or less national excitement and feeling, the state should decide that it was compatible with its "vital interests," "national honor," "independence," or "constitution" to arbitrate, then it might extend an invitation, or accept an invitation, to adjust the difference by arbitration. In short, neither the conventions of the First Hague Conference nor those which followed between particular states "extending the obligation" (except as noted) placed the slightest legal restriction upon the use of force in order to secure the settlement of an international dispute.

Such was the situation which faced the Second Hague Conference when it convened. To overcome the hesitancy which all statesmen feel about solemnly binding their governments to obligatory arbitration, the subject was adroitly approached from another side. It has been arranged that the creditor states, who may from time to time feel the necessity of protecting their subjects against the delinquencies of debtor states, shall agree to give to arbitration a definite jurisdiction whenever a debtor state, with whom a dispute has arisen in respect to "dettes contractuelles," shows a willingness to have the controversy settled by recourse to legal principles instead of armed force. A debtor state is protected by the law until it puts itself outside the law — that is, outside of the three reasonable reservations of the present convention. When a debtor state in a dispute over "dettes contractuelles" (1) refuses or fails to respond to an offer to arbitrate, or (2) in case of acceptance makes impossible the formulation of the agreement necessary to an international arbitration, or (3) after the arbitration has taken place fails to carry out the award rendered, a creditor state may resort to armed force to compel a settlement of the controversy. As was pointed out by the eloquent delegate from Brazil, Señor Ruy Barbosa, in the subcommittee which had the American proposal under consideration, the reservations in this convention, expressly permitting the use of armed force, were only such as would necessarily be implied in any scheme of obligatory arbitration which should omit to state them expressly.

From its first introduction in the conference, the American proposal enjoyed the almost unqualified approval of the delegations of Germany, Great Britain, France, Japan, Russia, Italy, Austria-Hungary, Portugal, and Spain. Nor was it entirely overlooked by these delegations that the convention embodied obligatory arbitration. The President of the Conference, M. Léon Bourgeois, whose attention has long been unremittingly given to advancing this form of arbitration, declared in the subcommittee: "The delegation of France will vote favorably on the proposal of the United States (surtout parce que nons y voyons un cas d'arbitrage obligatoire), especially because we see in it a proposition of obligatory arbitration." Baron Marschall von Bieberstein, the very able head of the German delegation, at once rose and declared that he did "not share this view" of the American project. This episode had particular interest because the convention, above all others before the conference of special solicitude to M. Bourgeois, was the one which proposed in direct terms the adoption of obligatory arbitration, and its defeat was largely due to the powerful objections made to it by Baron von Bieberstein, who contended that the states of the world were yet too inexperienced in arbitration to embark upon solemn treaties of obligatory arbitration. Difference of opinion existed among the delegates as to whether the American proposal actually involved obligatory arbitration. Some days before the colloquy between M. Bourgeois and Baron von Bieberstein, M. Beldiman, of the Roumanian delegation, had asked in the subcommittee: "Is it not, indeed, strange that we should adopt this new convention providing obligatory arbitration in the very matters (public bonds) in which the honor of states and their vital interests may be in the highest degree concerned when we were unwilling to adopt the convention of 1899 on obligatory arbitration, which expressly excepted all questions touching the national honor and the vital interests of states?" Strangely enough the delegations of Belgium and Roumania alone supported this objection, although the obvious effect of the American convention is to fix absolutely the right of a debtor state to insist on the arbitration of the contractual claims of foreign subjects. Indeed, by the lack of those absolving phrases "national honor" and "vital interests," the present convention is more obligatory than the so-called obligatory arbitration conventions.

## HISTORY OF THE AMERICAN PROPOSAL

Before noting some of the points in respect to the probable scope of the term "dettes contractuelles," it may be well to consider briefly the history lying back of and involved in the formulation of this particular convention.

On December 18, 1902, it will be recalled, Great Britain, Germany, and Italy united in the use of armed force to compel the payment by Venezuela of the claims alleged to be due their respective subjects. While the hostilities were in progress and some of the custom-houses of Venezuela were being seized, Dr. Drago, the Argentine Minister for Foreign Affairs, addressed to the Argentine minister at Washington an instruction in which he said that inasmuch as "the origin of the disagreement" was due in part to "damages suffered by the subjects of the claimant nations during the revolutions and wars" which had recently occurred in Venezuela, and in part to the delayed "payments on the external debt" of Venezuela, he proposed to seize the occasion, "suggested by the events that have taken place," to set forth "some considerations with reference to the forcible collection of public debts." He did so; and what he advocated, or is supposed to have advocated, gave rise to the so-called "Drago Doctrine."

In his instruction, Dr. Drago omitted to mention that Germany in July, 1901, had invited Venezuela to arbitrate the claims of her subjects in dispute, and that Venezuela had replied: "You insist that Germany shall participate in the examination of the claims, and Venezuela, on behalf of her sovereignty and by virtue of her domestic legislation, maintains that such participation is wholly inadmissible." Dr. Drago also omitted to mention that on December 7, 1902, the British Government called the attention of Venezuela to the claims of British subjects, including therein "an arrangement of the foreign debt," and requested that the justice of all these claims be at once admitted in principle, that some of them should be immediately paid, and that for the others Venezuela should "consent to accept the decisions of a mixed commission with respect to the amount and the guaranty for payment." Dr. Drago failed to note, also, in his instruction, that Venezuela, in replying to the British ultimatum, had made no reference to the employment of a mixed commission to determine the claims in dispute, but had contented herself by insisting on the adequacy and finality of her national laws and by stating that "the so-called foreign debt ought not to be and never had been a matter of discussion beyond the legal guaranties found in the law of Venezuela on the public debt." Likewise, Dr. Drago failed to mention that Italy, the third blockading Power, had on December 11, 1902, requested Venezuela to "be good enough to declare itself disposed to give to the claims of her subjects the attention which may put an end to further discussion, accepting the opinion of a mixed commission," and finally that Venezuela had answered this note in the same fashion she had those of Germany and Great Britain by ignoring the proffer of arbitration and insisting that her national laws were conclusive of the merits of the claims in controversy.

What Dr. Drago did in his famous instruction was to point out certain special considerations in respect to "the external debt" of states (the public bonds "floated" abroad) which ought to induce the adoption by the states of the American continents of a policy to this effect: "The public debt of an American state can not occasion armed intervention, nor in any wise the actual occupation of the territory of the American nations, by a European power." He contended that "the collection of loans by force implies territorial occupation to make it effective; that territorial occupation means the suppression of the governments of the countries on which it is imposed;" that there was considerable European expression in favor of establishing colonies in South America; and that, he feared, under the guise of "financial interventions," the yearnings, evidenced by that expression, might be suddenly stimulated and gratified. His point, as he himself has since stated, was "before and above all a statement of policy" which he wished to see adopted by the states of North and South America; it was something that should be supplementary to, if not a further definition of, the Monroe Doctrine.

How far the particular claims based on "the external debt" of Venezuela played a part in prompting the three blockading Powers to resort to armed force is difficult to determine. It is likely that their importance as an active cause for the armed intervention has been vastly over-emphasized. However, each of the treaties, which the blockading Powers made with Venezuela, as a condition to raising the blockade, contained a stipulation that the Venezuelan Government "undertakes to enter into a fresh arrangement respecting the external debt of Venezuela with a view to the satisfaction of the claims of the bond-holders. This arrangement shall include a definition of the sources from which the necessary payments are to be provided." As a consequence of these special stipulations respecting the public bonds of Venezuela, only four claims arising from bonds were presented to the ten international arbitration tribunals which sat at Caracas in the summer of 1903 to decide the private claims of ten Powers against Venezuela. Of these only two were allowed.

Belgium presented one such claim in the case of the Compagnie Générale des Eaux de Caracas v. Venezuela. The umpire took jurisdiction of the claim of this Belgian corporation to whom Venezuela had delivered bonds payable to bearer, notwithstanding that some of the stockholders of the corporation were not Belgians, and also that the present ownership of all the bonds was not shown to be Belgian. The award was for 10,565,199.44 bolivars, or something more than two million dollars. The claim of Ballistini v. Venezuela, presented by France, was disallowed, first, because the claimant was unable to produce the "original bonds or any part of them" and, secondly, because they were "nothing else but bonds of a public debt of the Venezuelan State of Guayana" for the recovery of which "Ballistini, like any other holder of the internal debt of the State of Guayana, is obliged to submit himself to the laws or decrees which govern the extinguishment of the said debt." The first reason being sufficient for the disallowance of the claim, the second must be taken as a dictum of Dr. Paul, the Venezuelan commissioner. This latter point appears to have come up in the claim of Boccardo v. Venezuela, presented by Italy. It was decided by the umpire, Mr. Ralston, without an opinion, though as a reporter Mr. Ralston states with respect to this claim: "Judgment was given on internal bonds on the authority of Aspinwall Case, Moore, page 3616." It is understood from the umpire that the bonds of Boccardo were national in character; they were delivered to him in payment of a debt, and, though payable to bearer, were never transferred by him. Boccardo was allowed 267,480.82 bolivars, or about fifty thousand dollars. The fourth bond claim, arbitrated at Caracas in 1903, was presented by the United States in behalf of one Jarvis. The bonds in this case were issued by a temporary ruler of Venezuela in payment for service and supplies rendered several years before to an unsuccessful revolution which he had led. The commission decided that the fact that the United States had not recognized the legal character of the Government of Venezuela at the time the bonds were issued was "conclusive upon its own citizens," and the claim was disallowed.

Such were the claims against Venezuela arising from the "public debt" due to the subjects of ten Powers, excepting, of course, those of the three blockading Powers, which were specially arranged for in the peace treaties. Judging from the character of these bond claims, Venezuela might well have accepted the proffer of arbitration, or even have proposed it, instead of writing long, evasive replies to the repeated requests of the three blockading Powers that she should give heed to the claims of their respective subjects. Instead of manifesting "surprise" each time that they had not assented to her arguments regarding the finality of her national law in such matters and going on to rehearse afresh those arguments, Venezuela might better, it would seem, have proposed arbitration by an impartial tribunal; for this can be set down as certain: sooner or later the powerful states are bound to insist upon the consideration of the claims of their subjects against a debtor state.

The debtor states would do well to remember that though international law postulates the equal independence of states and the equality of their rights and obligations under its rules, it has, as yet, developed no formal superior judicial or administrative authority, and that, as a consequence, to every state is accorded the right to determine for itself whether its international rights have been invaded. According to both practice and principle every state which considers itself aggrieved enjoys the sole right to decide the redress which it shall exact and, also, whether in a given case it has exhausted all the peaceful remedies it should pursue in order to secure redress. The use of force is a recognized legal remedy by which states may settle their differences. The debtor states should remember that states, like individuals, are entitled to maintain a reputable existence and to protect themselves from debilitation and destruction; that their dignity and reputation, their economic and social welfare, are so intimately bound up in the maintenance of the person and property of their subjects that they are compelled to guard jealously every invasion of the international rights to which their subjects, as nationals of a sovereign state, are entitled.

The proposition of Dr. Drago, which the Secretary of State, Mr. Hay, characterized as "ably expounded," attracted considerable attention during the years 1903–1905 and was supposed to have been given a place on the program of the Third Pan-American Conference held at Rio de Janeiro in July, 1906. As scheduled for the consideration of the conference it read:

> A resolution recommending that the Second Peace Conference at The Hague be requested to consider whether and, if at all, to what extent the use of force for the collection of public debts is admissible.

Dr. Drago has said that his proposal was "above all a statement of policy" for the states of the American continents to adopt. The resolution prepared for discussion at Rio de Janeiro proposed the question whether or not there should be submitted to the Second Hague Conference a question of law to which there was but one answer. For there is not the slightest doubt that as a matter of legal right, based on the practice and the principles applicable to the question proposed, each state determines for itself both the conditions under which it is justified in using force, and the extent to which it will go in the use of force, to collect the "public debts" due its subjects by another state. The Third Pan-American Conference in committee discussed the topic of its program and as a result of its deliberations formally resolved:

> To recommend to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts; and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.

As a consequence of the action taken at Rio de Janeiro in 1906, the United States reserved the right to introduce to the consideration of the Second Hague Conference, as an addition to the regular program prepared by Russia, the question of an "agreement to observe certain limitations in the use of force in collecting public debts accruing from contracts."

The history of the subject in the Second Hague Conference has some interest. It was originally submitted to the conference in the following form:

> Dans le but d'éviter entre nations des conflits armés d'une originie purement pécuniaire, provenant de dettes contractuelles, réclamées comme dues aux su jets ou citoyens d'une pays, par le gouvernement d'un autre pays et afin de garantir que toutes les dettes contractuelles de cette nature qui n'auraient pu être réglées à l'amible par voie diplomatique, seront soumises à l'arbitrage, il est convenu qu'um recours à aucune mesure coercitive impliquant l'emploi de forces militaires ou

navales pour le recouvrement de telles dettes contractuelles ne pourra avoir lieu jusqu'à ce qu'une offre d'arbitrage n'ait été faite par le créancier et refusée ou laissée sans réponse par le débiteur, ou jusqu'à ce que l'arbitrage n'aie eu lieu et que l'Etat débiteur ait manqué à se conformer à la sentence rendue.

The obvious effect of this language was to recognize the legality of the use of force except in the cases enumerated. An examination of the official reports of the proceedings shows that the delegation of Sweden was the only one to raise an objection on this point, though Italy and Spain reserved a favorable vote on the convention till the language in which it was formulated was explained and made more explicit. Reservations of one sort or another were made by some twenty-four delegations. This was a surprise to General Porter, who had introduced the proposal with a clear and searching inquiry into the advantages which, he believed, would accrue to all the states from the adoption of such a convention.

He had called attention to the "growing impression that the employment of armed force to collect unadjusted contractual debts from a debtor nation, unless restricted by some general international agreement, may become the most fruitful source of wars, or at least give rise to frequent blockades, threats of hostilities, and rumors of warlike intentions calculated to interrupt commerce, affect the markets of the world adversely, create a feeling of uneasiness, and disturb not only the countries concerned in the dispute but neutral nations as well." He showed that the disposition of neutral states to refuse to recognize the "pacific blockade," undertaken by a creditor state to compel the payment of such claims, necessarily leads to the effective blockade of actual war, and that the seizure of property and territory may naturally lead to a prolonged occupation, which may tend to disturb "the balance of power" and menace the world's peace. General Porter further pointed out that hostilities against a debtor state inevitably interrupt its foreign commerce, cut down its revenues from customs, and put it to the expense of resisting force by force—all of which merely diminished its means of paying its debts and aroused the anxiety of the subjects of other states respecting their claims against the common debtor to such an extent that their governments are frequently compelled to join in coercive measures against a debtor state whose finances may have become temporarily deranged from such natural causes as insurrections, loss of crops, floods, and earthquakes, and which, while without the means of making immediate payment, could meet all its obligations if given a reasonable time.

He quoted English and American statesmen to show that there is no absolute obligation on the part of a state to protect its subjects in their transactions with a foreign state, and that intervention in every case is entirely a matter of "expediency." He showed how easy it is for a state to be imposed upon by the ex parte statements of an unprincipled speculator who "is playing a game" in which "if he gains millions his Government does not share, * * * but if he loses he demands that it go even to the extent of war to secure sums claimed to be due and often grossly exaggerated." He spoke of "the early consideration and profound study given the general subject" by Dr. Drago, "one of our highly esteemed colleagues in this conference," and concluded by summing up the advantages which would accrue to the creditor, the neutral, and the debtor states, respectively, were the present convention against the use of force agreed to by all states. The certainty that "all disputed claims would be subject to adjudication by an impartial tribunal," he stated, would eliminate the speculators who "trade upon the necessities of feeble and embarrassed governments," and he might have added (if it had been diplomatic to do so) it would tend, also, to eliminate the improvident stipulations to which debtor states had been accustomed to agree.

Of the reservations offered by the various delegations to the original convention submitted by the United States, there were two in particular which received the concurrence of several of the Latin American states: First, "recourse to arbitration should be permitted only in the case of denial of justice after the judicial remedies of the debtor state had been exhausted;" second, "claims arising from the public bonds of a debtor state should in no case be cause for a military attack or the actual occupation of American territory." The delegation of Venezuela led in insisting upon the first reservation; the second was advanced by Argentina, and the reasons for it were explained by Dr. Drago in substantially the same language as that which he employed in his paper on "State Loans in Their Relation to International Policy," which appeared in the July (1907) number of this JOURNAL. The arguments of Venezuela were the same as those which she advanced repeatedly in her diplomatic correspondence with Germany, Great Britain, and Italy respecting the claims of their respective subjects against her. Common cause was made on these two points by eight of the Latin American states when the convention in its revised form came before the full conference for adoption. Argentina, Colombia, Ecuador, Guatemala, Nicaragua, Paraguay, Peru, and Uruguay voted for the convention, but made the two reservations. Venezuela abstained from voting because her delegation could only subscribe to the first paragraph of the convention, viz, the agreement not to use force for the recovery of contractual debts.

Forty-four states took part in the final vote of the full conference. Thirty-nine voted in favor of the convention; ten of these made reservations. Five abstained from voting — Belgium and Roumania, because the convention made no reservation in case the "vital interests" of a state were concerned; Switzerland and Venezuela, because they considered that their national laws gave adequate protection and remedies to foreigners; and Sweden, without advancing any reason.

Such is the history of the first convention involving obligatory arbitration adopted by a Hague conference and recommended to the states of the world for ratification. It had its origin in the famous instruction of December 29, 1902, written by Dr. Luis Drago, and though it fails to embody what he sought, it is not too much to say that it was largely due to his sympathy with the general proposition and to his influence upon several of the Latin American delegations in the Second Hague Conference that they did not abstain from voting for the adoption of the convention. The ratification of the present convention by the forty-four powers who took part in the Second Hague Conference will undoubtedly mark an important advance in the history of international arbitration.

### CONSTRUCTION OF THE TERM "DETTES CONTRACTUELLES"

Before the subcommittee the term "dettes contractuelles" was considered "too vague" by Dr. Drago and the delegate of Servia, M. Milovanovitch. They wanted to know if it would apply to disputes arising from contracts to which two states were the direct parties as well as from contracts to which a state and the subjects of another state were parties. General Porter answered that "the distinction has little importance here." He might have answered that the language of the convention was not susceptible of the former construction. They wanted to know, too, if the term would apply to the claims arising from the public bonds of a state held by the subjects of another state. Dr. Drago believed that it would apply and desired that an exception should be made in express terms, because, as he contended, claims arising from the external debt of a state should never under any circumstances, at least so far as the states of the Americas were concerned, be recoverable by armed force. It would probably have pleased Dr. Drago to have had a declaration or reservation made in the convention on contract debts somewhat similar to the one made by the United States in both the first and second Hague conventions for the peaceful adjustment of international differences, which reads:

> Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state, nor shall anything contained in the said convention be so construed as to require the relinquishment, by the United States of America, of its traditional attitude toward purely American questions.

M. Milovanovitch, on the other hand, sought, in order to avoid any misunderstanding, to have substituted for the words "de dettes contractuelles" the words "provenant de dettes publiques ou autres dettes contractuelles." It is difficult to see in what respect these words would have been an improvement. If the right to sue the government in respect to the interest or principal of the bonds is given generally by statute or specifically in the case of particular bonds, there is certainly no sound reason for not denominating the legal relation established between the government and the bondholder as one of contract, even though the right to sue is qualified by a special procedure, a limited right of appeal, etc. It was asserted by M. Milovanovitch that states never make themselves suable in respect to the bonds they issue. If this were so, what then would be the legal relation established between the government and the bondholder? Having regard to the precise use of juridical language, could it be said that there is any legal relation between them? It would seem merely a moral obligation on the part of the state. Bonds of this character, then, could not come within the terms of the present convention; a dispute arising between states in respect to such bonds would be determined by the regular principles of international law and practice.

However, the fact is that the right to sue on the bonds issued by states is generally allowed. Action in contract to recover principal or interest, due and unpaid, may be brought on the United States bonds in the Court of Claims, or a mandamus may issue to the Secretary of the Treasury, under existing law, to compel him to pay the interest on United States bonds due and unpaid.

This brings us to the most difficult question which might be raised in respect to the proper construction of the term " dettes contractuelles" Suppose a general law, enacted by a legislature in whom is reposed all the residuary powers of a state's sovereignty, should have the effect to annul or substantially modify the contractual rights which a foreign subject enjoyed against such state; would it be proper to consider that such action on the part of a state, taken, it must be assumed as a matter of public exigency, is a breach of its contract with the foreign subject? For example, it has been repeatedly held in the United States Court of Claims that " the United States as a contractor is not responsible for the United States as a lawgiver." Thus it was said in Deming's Case. Here the claimant contracted to furnish the United States certain supplies, and Congress later imposed an additional duty on some of the supplies, and also passed a legal-tender act. The effect of both these acts was greatly to increase the cost of the supplies to the claimant and cause him a loss on his contract with the United States. The Court of

Claims said: "Were this action brought against a private citizen, against a body corporate, against a foreign government, it could not possibly be sustained. In this court the United States can be held to no greater liability than other contractors in other courts."

The principle has also been repeatedly applied in the Court of Claims where the act of state was that of an executive officer. The claimants in Jones's Case contracted with the United States, through the Commissioner of Indian Affairs, to survey certain public lands which at the time were protected from Indian attack by United States troops. After the claimants had begun work on the contract, it became necessary to withdraw the troops. When this was done by the United States War Department, the Indians swooped down upon the surveyors and caused them much delay and increased expense in the execution of their contract. The claimants sued to recover on the ground that the United States could not change its attitude or its policy in a material degree, without incurring the responsibility of making the claimants just compensation for all additional expenses thereby occasioned. The Court of Claims held: "This position can not be sustained. The two characters which the Government possesses as a contractor and as a sovereign can not be thus fused; nor can the United States while sued in the one character be made liable in damages for its acts done in the other. Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, can not be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons."

Every state in the administration of its national law distinguishes those governmental acts which give rise to breaches of contract (to which it is party) from those which, however much they may annul or modify such contracts, give rise to no legal damage, i. e., are *damnum absque injuria*. Every state denies that its public governmental acts can give rise to "dettes contractuelles."

Under the present convention are these distinctions of the national law to be ignored? Is the position to be taken that all acts of a state, which annul or otherwise interfere with the contracts between it and the subjects of a foreign state, may give rise to "dettes contractuelles?" This is undoubtedly the true construction. The term "dettes contractuelles" as used in the national law of states denotes government liability in matters of contract; as used in the present convention it connotes arbitral jurisdiction in international disputes, or at least the absence of force under certain circumstances. The intent of the convention is to refer to international tribunals the very delicate and difficult task of determining the liability of one state to another where the public governmental acts of the one have annulled or modified the contracts which it had with the subjects of the other. But the present convention does not give a jurisdiction to arbitration in the sense that one state may summon another state before an international tribunal to have any controversy between them respecting contract claims determined. No tribunal exists with authority to entertain such controversies. The powers in dispute must establish by convention, or other agreement, their forum, and they may stipulate expressly the law which the arbitrators shall apply. However, if the arbitrators are untrammelled by such stipulations, they are free to fix, according to their own views, the international standard of state liability for damages suffered by foreigners in respect to their contracts with a state.

In recommending the present convention to the states of the world for ratification the Second Hague Conference has taken a well-measured step toward the giving of a definite and unconditional jurisdiction to arbitration. Its ratification and faithful observance should act as an entering wedge to the development of an arbitral jurisdiction. Gradually the present rough arrangement may be improved and its incomplete jurisdiction extended, as the early writs in England extended the jurisdiction of the courts. Gradually the state may be expected to discover that their "national honor" and "vital interests" are not jeopardized by referring their differences to the arbitrament of law. Gradually states, and the society of which they are composed, may be expected to acquire the habit of submitting international disputes to the decision of international tribunals in which they have confidence. Gradually the crude arbitration arrangements of the present may be perfected, and that confidence in the fairness and judicial attitude of the arbitrators which

# THE HAGUE CONVENTION CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN LAND WARFARE.[1]

1. Hugo Grotius says, at the close of Chapter XVII, Book III, of his work *De jure belli ac pacis,* that it may be advantageous (for a neutral) to make a convention with each of the belligerents so that it may be allowed to abstain from the war with the consent of both sides. This opinion of the father of the law of nations might be deemed to be well reasoned in 1625, but it reads very strangely in 1908.

To be neutral is to-day the right of all nations, not derived from the consent of the belligerents but rather imposed upon them absolutely. War is an abnormal condition, occurs at increasingly greater intervals, and is becoming of shorter and shorter duration. To make the briefest passing review of the history of the eighteenth century one would have to summarize the years of peace; but for the last half century one would gain time by summarizing the years of war. Since 1815 the territorial expansion of the civilized world and the great variety of political and economical interests on the Continent have done away with the spectacle of world wars. In the present time not only would an armed conflict of one hundred years be impossible, but even one of thirty, or ten or seven years' duration.

This tendency toward the limitation of warfare goes beyond juridical doctrines and has a direct and positive influence upon the progressive tendency and continuous development of the law of neutrality. Although the word "neutrality," which was unknown to Grotius, was used five years before the publication of his immortal work by the obscure author Neumayr de Ramsla, nevertheless the idea which it represents at the present day is the result of the pacific sentiment of our times.

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[1] Translated by Miss Margaret M. Hanna, Department of State.

It is necessary to limit, so far as possible, the effects of war, in order not to disturb in international society those who wish to continue to enjoy the benefits of peace, and it is necessary that the latter shall be able to declare, in the name of the law, that the peace continues for them unaltered, and that in their dominions and sphere of action they will proceed irrespective of the war and unmoved by the war.

When neutrality began to develop into theory and practice in the eighteenth century it was supported by the desire of each belligerent to prevent the enemy from gathering forces with the assistance of noncombatant states. By a reaction, due partly to jealousy and partly to resentment, the belligerent states consented to the inevitable necessity that there be neutral states, on the condition of imposing upon them strict duties, so that the enemy country of either could not be benefited by that situation. And, in fact, theory and practice set forth and demanded a series of duties for neutral states, as though such condition were a grave wrong or menace to international society.

At the same time, the comparative difficulty of land communication and the isolation of states caused the principal interest in these questions to be turned upon the sea and maritime enterprises. The two great armed neutralities were in the interest of commerce at sea, and the decisions of the Congress of Paris of 1856 dealt with the maritime practice of neutrals.

2. By the time of the meeting of the conference at The Hague there had taken place a new and important evolution in the theory and practice in regard to these questions. In brief, neutrality to-day does not depend upon the interest of the belligerents, nor upon their military exigencies, but upon the pacific interests of the universal community, constantly becoming more exacting, and upon the right of the noncombatant states to maintain their natural prerogatives in spite of the conflict.

A series of acts and abstentions, which were formerly called duties of neutral powers, are still called duties, but of the belligerent states. Instead of saying, for example, that the neutral must prevent the passage across its territory of the belligerent army, it is now held that the combatants must refrain from crossing neutral territory with their armies. This is not simply a different form of expression, but a radical change in the juridical situation of both, and therefore in their international responsibility.

Another step which the circumstances of intense and pressing modern social life have brought with it, is the study of conditions of neutral and belligerent states during war on land, giving rise to-day to as many and as important questions as those which were brought up by the maritime commerce of the eighteenth and nineteenth centuries.

On both land and sea the influence of two modern theories has been felt — the one international, the other political. As war is declared between states and not between the individuals residing therein, this international distinction between a state and its nationals during the war has given rise to the theory that the foreigner resident in belligerent territory has a peculiar juridical status during hostilities. Thus has arisen the theory of individual or private neutrality in the public relations of the law of nations.

Likewise, the democratic character of the modern state tends to distinguish the conduct, right, duty, and responsibility of individuals from the general functions of the government. Therefore, neutral persons may carry on lawful acts in aid of one of the belligerents which the neutral state admits because such acts lie within the sphere of individual activity touching which the state does not concern itself, but which the state itself could not carry on without failing in the elemental duties of neutrality. Take, for example, the trade in arms and munitions of war.

3. These generalizations will serve at the same time as an explanation and as a touchstone for the work accomplished by the Second Peace Conference in the convention which we shall examine in this article. Three subjects are vigorously treated: (*a*) The rights and duties of belligerents with respect to neutral powers during land warfare; (*b*) the rights and duties of the neutral persons who are outside of the sovereign sphere of the belligerents; and

(*c*) the juridical status, as affected by the war, of neutral persons and of their private property in belligerent territory or territory occupied by belligerents.

All of the above was embodied in a resolution which the First Conference of 1899 approved, with the view to having the questions relating to the rights and duties of neutrals included in the program for the Second Conference.

4. The first two out of the five chapters of the convention upon the rights and duties of neutral powers and persons in land warfare, negotiated at The Hague, refer to states and not to persons. A proposition of the French delegation, added to and amended by the English, Swiss, Dutch, German, Belgian, and Danish delegations, formed the basis for the agreements.

The original French proposition provided:

> ARTICLE 1. A neutral state can not be held responsible for the acts of its subjects, of which a belligerent may complain, except when such acts are effected within its own territory.
>
> ART. 2. A neutral state shall not tolerate, within its territory, the organization of corps of combatants or the establishment of recuiting agencies in aid of a belligerent. But it shall have no responsibility if some of its subjects shall cross the frontier to enlist in the service of either of the belligerents.
>
> ART. 3. A neutral state is not bound to prevent its subjects from exporting arms and munitions and in general from furnishing an army with all that may be useful for either of the belligerents.
>
> ART. 4. Prisoners who may escape from belligerent territory and reach neutral territory shall remain at liberty.

5. The amendment of the British delegation accepted the first four articles of the French proposition, adding to the last prisoners escaping from territory occupied by belligerents, and also adding two other suggestions: First, that a neutral state is bound to prevent the installation within its territory of any wireless telegraphic or other apparatus serving as a means of communication with belligerent maritime or land forces; second, that passage be prohibited across neutral territory of troops, munitions, and provisions of war for the use of a belligerent.

The Dutch delegation proposed, on the one hand, that the liberty of prisoners who entered neutral territory should be extended in cases of asylum or refuge to those who were conducted by an armed force. Moreover, they proposed that war supplies, taken from the enemy and carried by an army taking refuge in neutral territory, shall be returned to the state to which it belongs after the termination of the war. They proposed, further, that the declaration should expressly stipulate that the fact of a neutral state resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act.

Germany contributed to the problem by suggesting a new article providing that the neutral state is not bound to prohibit or restrict the use by belligerent states of cables and telegraphs which are within its territory, including government installations as well as those belonging to private individuals or companies; but that any prohibition or restriction should apply equally to all belligerents.

On the part of Switzerland, certain amendments as to form were proposed, emphasizing the idea that the neutral state is not bound to receive escaped prisoners, nor to tolerate their residence in their territory. The Belgian amendments referred, in great part, to the matters of form and expression, except that they proposed that neutral territory is inviolable and that the neutral state should be allowed to permit escaped prisoners to go at liberty or to assign them a place of residence.

And, finally, the Danish proposition declared that if a neutral state mobilizes its military forces with a view to preparing in good time for the defense of its neutrality, even although it may not have received notice of the opening of hostilities from the belligerents, such act shall not be deemed unfriendly with respect to either contending party.

6. With this material, the second subcommission of the second commission and its *comité de redaction* and *d'examen*[2] proceeded to their respective labors. It was unanimously admitted that it

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[2] This committee, presided over by Mr. Asser, was made up of General de Gündell, from Germany; General Davis, from the United States of America; Baron Giesl de Gieslingen, from Austria; Beernaert and van den Heuvel, from Belgium; Bustamante, from Cuba; Brun, from Denmark; Renault, from France;

was not proper to formulate the projected convention as applicable only to the duties of neutrals, but that it was necessary to draft it in a form to include duties of belligerents, and that in certain cases concrete duties should be imposed upon them.

The responsibility of the neutral state was defined to be that it was not possible to demand neutrality for everything that takes place in its territory, nor for anything that takes place outside of it. Japan wished to extend the responsibility of the neutral state to territory over which it exercises jurisdiction, or a protectorate, or, as Colonel Borel said, in broader terms [to territory] to which its public authority is extended. Difficulties of drafting, aside from the individuality of such cases, made it advisable that the definitive project should include only the territory of the neutral state.

The first agreement, accepted without debate, was the fundamental declaration, opportunely proposed by the Belgian delegation, that the territory of neutrals is inviolable to belligerents.

7. Aside from the general lines mentioned in the preceding paragraphs, rules were established to govern the legal and illegal acts which may be performed by belligerents in neutral countries. Recruiting offices and the organizing of corps of combatants were prohibited without discussion, but, on the other hand, it was positively settled that neutral states have no responsibility for the acts of persons who may individually leave the country to enter the service of either of the belligerents.

Although Germany held, with regard to this proposition and with respect to neutral individuals residing in belligerent territory or in territory occupied by belligerents, that the belligerent states should engage not to accept the service of foreigners and that neutral states should prohibit such service by their subjects, this innovation, which departed from established usage up to the present time and seriously threatened individual liberty, did not meet with success in the commission.

Lord Reay and General Elles, from Great Britain; Tsudzuki, from Japan; Eyschen, from Luxemburg; General den Beer Poortugael, from the Netherlands; Samad Khan, from Persia; Beldiman, from Roumania; Borel (Redacteur) and Carlin, from Switzerland.

The theory of respecting neutral territory in the direct uses of war was carried to the extent of prohibiting belligerents from sending their troops, convoys, munitions, or provisions across the territory of a neutral state. But the neutral state, in the protection of commerce and to avoid becoming an indirect ally of either of the belligerents, remained exempt by express provision from prohibiting, for the use of either of the belligerents, the exportation or the transit of arms, munitions, and anything that might be useful to a fleet or an army.

With regard to the medium of communication, a distinction as sensible as it was necessary was made. The neutral state is not bound to prohibit or restrain the belligerents from the use of telegraphic or telephonic cables or of wireless telegraphic apparatus which may belong to it or to companies or private individuals; but any restrictive or prohibitive measures which it may adopt shall apply impartially to all belligerents, seeing to it that private persons and companies owning apparatus shall follow the same course. This latter point gave rise, on the part of the British delegation, in the subcommission, to a reservation, which was not repeated in the conference, and the principle of the freedom of communications was accepted by Great Britain on condition that in the report it should appear that the liberty of a neutral state to transmit dispatches by means of land lines, submarine cables, or wireless apparatus does not comprehend the right to use them or to permit their use to lend obvious assistance to either of the belligerents. It seemed to the committee that this last reservation leaves the broad wording of the convention a little indecisive and exposed to practical difficulties.

At the same time, and as another of the distinctions already mentioned, it was specifically prohibited to the belligerents —

(*a*) To install within the territory of the neutral state wireless stations or any other apparatus destined to serve as a means of communication with the belligerent sea or land forces; and,

(*b*) To use installations of this kind established by them before the war, for exclusively military purposes, and which may not have been open to the service of public messages.

The above clause (*b*), which was suggested by some remarks of the first Japanese delegate in the *comité de redaction*, and amended by the Russian delegate, and then modified by the British, to make it harmonize with the convention on wireless telegraphy of 1906, is explained, in the report submitted to the conference, to be for the purpose of inducing the British and Japanese delegations to abandon their reservations made previously to three of the articles of the proposed convention. It is to be hoped that this section will not, in the future, provoke any serious difficulties.

8. Japan held that the use of neutral territory should also be prohibited as a base for storehouses or military depots. A few observations, however, showing the uselessness of such a measure, the facility with which it could be evaded by availing of private individuals, and the complications to which it would give rise with respect to the neutral state, were of such weight with the Japanese delegation that they refrained from insisting upon their proposition.

9. With respect to escaped prisoners of war who may reach neutral territory, there was no difficulty whatever in accepting the universally established rule that they should be at once at liberty; but the proposition with regard to those prisoners who are accompanied by an armed enemy force in search of asylum or refuge aroused a lively debate in the committee and in the commission.

Some of the delegations thought that to leave them absolutely at liberty would be in contravention of article 59 of the rule of 1899 concerning laws and customs of war on land, as well as of article 15 of the convention adopted by this Second Conference on the 20th of July, 1907, for adapting to maritime warfare the principles of the Geneva Convention negotiated the previous year. In both conventions it is provided that the wounded or sick, belonging to belligerent forces and brought by land or sea into a neutral state with its consent, must remain under the guard of that state, so that they may not take part anew during the war in the hostile operations.

The case is, however, different. When a body of the army, encamped near the frontier, enters neutral territory and there yields up its arms, it does so undoubtedly in order to avoid surrender.

If it shall have chosen to surrender, it is undeniable that the enemy prisoners which it had should immediately be at liberty. How could a neutral state consent that a war prison be maintained for them simply because the military force which guards them has substituted surrender for entrance into its territory?

Comparing such diverse questions as human liberty and material property, one of the Russian delegates maintained that the logic of such reasoning would also carry with it the delivery to the victorious enemy of the arms and munitions of the refugee forces; but the extreme difference between both hypotheses strengthened the other reasons in support of the liberty of prisoners. Aside from humanitarian considerations, it is easy to comprehend that neutral states neither can nor ought to permit a foreign armed force, once having put foot into its territory, to continue exercising there effective power, or even the control which the holding of prisoners under guard would imply. As soon as the army crosses the frontier and leaves the belligerent territory it loses every right and title of authority which it exercised over enemy prisoners, and the latter recover *ipso jure* their liberty. And in order that they may also recover it *ipso facto* the authority of the neutral state intervenes.

The commission — except for a Russian reservation not maintained or repeated in the plenary session of the conference — adopted the formula favorable to prisoners of war in such situation. And with respect to all prisoners of war escaping or liberated in neutral territory, it admitted the right of the state to tolerate or not their presence, and to indicate for them a fixed place of residence if they remained in the country.

10. Shall material of war, carried by the army across the neutral frontier and which the said army has captured previously from the enemy, continue to belong to the party which brought it in or be retained by the neutral state in order to turn it over to its former owner when the war shall close? This latter theory was strongly urged by one of the Dutch amendments, without doubt for the same reason which prompted the proposition regarding the liberation of prisoners.

Nevertheless, the case is different. Aside from the material difficulties which seem to distinguish property which once belonged to the interned army and now belongs to its enemy, it is important not to overlook that right of capture in war grants to each belligerent absolute and unrestricted ownership of the armaments and military effects which it captures from the enemy. The neutral state might impose a sort of rescission of title perhaps long antecedent to the moment of intervention.

There is another consideration — a practice in civil law — which should not be lost sight of, because it goes further than international rule. Even those tribunals in which the recovery of personal property has the greatest latitude hold that for third parties possession is equal to title. Only a judge has sufficient authority to intervene between interested parties and deprive one of them of possession, granting it to the other. It is not proper for a neutral state to take unto itself judicial functions and decide between the belligerents with respect to the rights of either to confiscated material of war. A written regulation upon the matter in these conventions would completely deprive the contending nations of their liberty to decide at the close of the war as to the destination of that material. Rightly, then, the authors of the proposition refrained from insisting upon the amendment and kept silent regarding the regulations which the conference should adopt.

11. Neither was it thought necessary to expressly include the Danish proposition concerning the mobilization of military forces by a neutral state. It deals with an undeniable right, but subordinated in its exercise to numerous political exigencies. It might also happen that the defense of neutrality might serve as a pretext for mobilization with really other intentions. It was expedient not to mention explicitly such a contingency, which the plenary conference did not discuss.

12. The result of the amendments to which we have referred, and of the study of the problems alluded to, was a draft of a declaration concerning the rights and duties of neutral states in land warfare, which the conference approved unanimously and without any reservation at the plenary session, September 7, 1907. The text is as follows:

ARTICLE 1. The territory of neutral powers is inviolable.

ARTICLE 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.

ARTICLE 3. Belligerents are likewise forbidden to —

(*a*) Erect on the territory of a neutral power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(*b*) Use any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes, and which has not been opened for the service of public messages.

ARTICLE 4. Corps of combatants can not be formed nor recuiting agencies opened on the territory of a neutral power to assist the belligerents.

ARTICLE 5. A neutral power must not allow any of the acts referred to in articles 2 to 4 to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.

ARTICLE 6. The responsibility of a neutral power is not engaged by the fact of persons crossing the frontier separating to offer their services to one of the belligerents.

ARTICLE 7. A neutral power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

ARTICLE 8. A neutral power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

ARTICLE 9. Every measure of restriction or prohibition taken by a neutral power in regard to the matters referred to in articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral power must see to the same observation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

ARTICLE 10. A neutral power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral power.

ARTICLE 11. The fact of a neutral power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act.

13. The conference of 1899, in drawing up the declaration concerning the laws and customs of war on land, included four articles which properly did not belong to the subject, and which are grouped

at the end in a chapter relating to interned belligerents and wounded tended in neutral territory.

One of these articles, the fifty-seventh, declares that a neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose; and it shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

By article 58, in the absence of a special convention to the contrary, the neutral power shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace the expenses caused by the internment shall be made good.

By articles 59 and 60 a neutral state may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral power so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral state with regard to wounded or sick of the other army who may be committed to its care, the Convention of Geneva being applicable to all the interned under such conditions.

We mention these articles because they form part of the new declaration of the rights and duties of neutral powers in land warfare, adopted at the Second Peace Conference, and because article 57 was the subject of two Japanese amendments given below.

The following is the text of the two amendments in their final form, after modification in the first subcommission of the second commission, on July 10, 1907:

(1) Officers or other individuals connected with the armed forces of a belligerent, interned in a neutral state, can not be given their liberty or authorized to return to their country, except with the consent of the other side, and under the conditions which the latter shall stipulate; and

(2) The parole given to a neutral state by the individuals mentioned in the foregoing article shall be deemed equivalent to a pledge given to the enemy.

These propositions appeared to the *comité d'examen* too restrictive. If an imminent family misfortune or other unforeseen analogous circumstance imposed the humanitarian duty of authorizing the interned officer to journey temporarily to his country, there might not be opportunity nor sufficient time to consult the enemy, nor should the charity which should inspire the neutral state be affected by the severity of the belligerents.

The report of the committee, without going into these considerations, confined itself to stating that, on account of its exceptional character, the case was among those which do not require any regulation in fixed terms, although the Japanese proposal, inspired by modern precedents, contained a useful suggestion for neutral states who wished to be free from any responsibility.

Accordingly, the text of the declaration of 1899 remained in that particular without modification, leaving the neutral powers at liberty to be guided by circumstances. The four articles to which we have adverted — since no amendments were proposed respecting the other three — were therefore complete, together with the new regulations, all of which, in fulfillment of this part of the program, were accepted by the Second Peace Conference.

14. In the first and second chapters of the convention an important omission is noted. The rights and duties of neutral powers with respect to the states at war properly include (first) their own territory, (second) foreign territory, and (third) the high seas. Only declarations touching the activity of a state in conducting operations within its own territory are included in the draft convention. There is absolute silence as to the second, and the third has no relation to a convention for rules governing land warfare.

Even with regard to the territory proper of each neutral state, it can not be said that the rules agreed upon are a perfect code of neutrality. They seem to us, nevertheless, to be of indisputable utility. Even excepting those cases which are omitted and left for settlement in a future conference, certain generally recognized principles are admitted which do not lose anything by being incorporated into an obligatory treaty, and certain cases concerning which controversy was possible and even frequent are settled with precision and good sense.

Moreover, the conference of 1907 did not adopt any rule which entailed a retrocession from established practice or which wounded the interests or rights of weaker nations. We have observed that in all doubtful cases it was inclined to the most generous and liberal solution. Public opinion should, under the circumstances, be satisfied with this partial codification of the rights and duties of neutral states in land warfare.

For neutral states it has substituted a set of rules in place of the present arbitrary decisions, and states, like citizens in private life, will be the more tranquil and secure the more complete and precise are the laws to which they are subject. More particularly the smaller powers must feel tranquil and gratified each time their duties and functions are made more concrete by international treaty. They are not at the mercy of selfish interests or foreign humor, and are not exposed to difficult complications should they defend their conduct or their duties. They can show a text which is obligatory upon all and before which all must bow.

15. The third chapter of the convention which we shall now consider refers to neutral persons, and the fourth to railway material. Their genesis was different and much more laborious than the first two. They originated in a project presented by the German delegation on the 29th of July, 1907.

We will quote it in full, taking note of the fate it met and of the fact that out of its twelve articles only three slightly modified succeeded in obtaining the definitive acceptance of the conference. Their discussion, nevertheless, caused most interesting debates, which it seems appropriate and opportune to consider.

16. The German proposition, divided into three chapters, and intended by its numbering to continue the old declaration concerning war on land, is as follows:

## SECTION V.

### CHAPTER I.

### *Definition of a neutral person.*

ARTICLE 61. The nationals of a state which is not taking part in a war are considered as neutrals.

ARTICLE 62. A violation of neutrality involves loss of character as a neutral person with respect to all the belligerents. There is a violation of neutrality —

(*a*) If the neutral person commits hostile acts against a belligerent;

(*b*) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed forces of one of the parties;

ARTICLE 63. The following acts shall not be considered as committed in favor of one belligerent in the sense of article 62, paragraph (*b*):

(*a*) Supplies furnished or loans made to one of the belligerents, provided that they do not come from enemy territory or territory occupied by the enemy.

(*b*) Services rendered in matters of police or civil administration.

### CHAPTER II.

### *Services rendered by neutral persons.*

ARTICLE 64. Belligerents shall not solicit neutral persons to render their service, although they [the interested persons] may consent to it.

The following shall be considered as services of war:

Any assistance by a neutral person in the armed forces of the belligerents, in the character of combatant or adviser, and, if he shall have submitted to the laws, regulations or orders in force by the said army, of other classes also, for example, secretary, servant, or cook. Services under guise of an ecclesiast and health officer are excepted.

ARTICLE 65. Neutral powers engage to prohibit their nationals from enlisting in the military service of the army of either of the belligerents.

ARTICLE 66. Neutral persons shall not be obliged, against their will, to lend services, not considered services of war, to the armed force of either belligerents.

It shall be permitted, nevertheless, to demand sanitary or police services, outside of the field of the struggle.

Such services shall be compensated, provided it is possible to do so. If not paid in cash, the necessary formal receipts shall be given.

## CHAPTER III.

### *Concerning property of neutral persons.*

ARTICLE 67. No war tax shall be demanded from neutral persons.

A war tax is deemed to be any requisition demanded expressly for the purposes of the war. The enforcement of laws and existing tolls, or of contributions especially decreed by one of the belligerents, in the enemy territory which it may occupy, for the necessities of the administration of that territory, are not deemed to be contributions of war.

ARTICLE 68. The property of a neutral shall not be destroyed, misused, or injured unless required by the exigencies of war. In such event, the belligerent is not obliged to indemnify in its own country or in the enemy country, except when the nationals of another neutral country or of his own may enjoy equal indemnification and reciprocity may be guaranteed.

ARTICLE 69. The belligerent shall make compensation for the use of neutral real property, in the enemy country, the same as in its own country, provided that reciprocity is guaranteed in the neutral state. In no case shall this indemnity be greater than that provided by the legislation of the enemy country in case of war.

ARTICLE 70. Belligerents may expropriate and use for military purposes, and without immediate reimbursement and cash payment, all the neutral goods found in its country. They may do the same in enemy country, within the limits and under the conditions specified in article 52.

ARTICLE 71. Neutral vessels and their cargoes shall not be expropriated by a belligerent, except when they are used for river navigation within its territory or within the enemy territory. The indemnity shall equal, in the event of expropriation, the actual valuation of the vessel and of the cargo and ten per cent more. In the event of the employment of the vessel, the compensation shall be ten per cent more than the customary price. These payments shall be made immediately and in cash.

ARTICLE 72. Indemnity for the destruction or injury of neutral goods, due only in their use for military purposes, shall be regulated in conformity with the principles established in articles 70 and 71.

17. This project called forth immediately, and during the debates which it aroused in the subcommission, in the *comité d'examen*, and in the commission itself, various amendments. They may be classified into three divisions. The first, those amending the original draft by new suggestions or by a modification of some detail included or inferred in the project; some of these we shall examine as we touch upon and consider the problems to which they relate.

The second refers to the regulation of questions omitted entirely from the German proposition. These were principally the propositions of Luxemburg and Servia concerning neutral railroads.

But the third, the most important, is an amendment proposed by the French delegation when the discussion was well advanced, and which represents an opinion entirely opposed to that expressed by Germany, with regard to neutral property. Its principal article provided that neutral property shall be treated by the belligerent:

First, in its own territory, the same as the private property of its nationals;

Second, in enemy territory, the same as the private property of nationals of the enemy state.

18. The German proposition was necessarily the basis of all the discussions, and it is proper therefore that, in examining it, we shall consider the different questions to which it gave rise. In brief, it comprised three classes of questions — the definition of a neutral person and the conditions by which that condition is lost; the personal services which may be required of a neutral in time of war; and the status of his property in belligerent territory or in territory occupied by the belligerent.

With regard to the meaning of the expression "neutral persons," Mr. Beernaert moved and obtained in the committee the suppression of the word "persons," using only the word "neutrals" as a more adequate expression in French. Also, upon motion of Mr. Beernaert, and by reason of certain suggestions and doubts expressed by Mr. Hagerup, for the phrase "natives," in French "ressortissants," in the original draft, was substituted the more specific and concrete word "nationals."

Upon motion of the Swiss delegate, accepted by Baron Marschall, the idea of a person losing his neutral character was changed so as to provide that the neutral shall not be allowed "to avail of his neutrality" under certain circumstances. Otherwise the German draft of article 62 was preserved, but, further, upon the suggestion of the Swiss delegate, a paragraph was added — inspired by the view that neutral persons do not commit any particular crime when they violate neutrality. This additional paragraph provides that a neutral shall not be more severely treated by the belligerent, as against whom he has abandoned his neutrality, than a national of the other belligerent state could be for the same act.

A motion of Mr. Houdicourt, delegate of Haiti, expressly stipulated that expressions of sympathy through the medium of the press are not deemed hostile acts against the belligerents. International law ordinarily affirms this, and it should fairly be understood from article 62, above cited. Spoken or written expressions of opinion can not be included in the legal category of "acts."

To article 63, above cited, was added the prohibition against furnishing supplies or loans when the person who furnishes the supplies or makes the loans lives in enemy territory or territory occupied by the enemy. Therefore, the following acts shall not be considered as committed in favor of one belligerent by reason of which the neutral can not avail himself of his neutrality:

Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories. In the new form the restriction concerning sums loaned proceeding from enemy territory or territory occupied by the enemy disappeared in the alteration.

With these comparatively simple alterations, the first chapter of the German proposition was accepted without difficulty.

19. It was not, however, so with the second chapter. The fundamental thought was the prohibiting of neutral persons from lending their services to belligerents, and therefore belligerents were prohibited from accepting such services even though the interested parties might consent, and neutral powers were directed to restrain their subjects or citizens.

The French delegation, through Messrs. Bourgeois and Renault, immediately objected to this proposition. It was justly argued that it was not clear that the belligerent ought to abstain from availing of the services of neutral persons — so beneficial in certain famous instances — or that the neutral state ought to bind itself to restrain them, thus exceeding the duties which impartiality imposes upon it in war and converting the passive condition of nonintervention, which is its mission, into that of an active obligation. And, this point of view being warmly seconded by the English and Swiss delegations, among others, the German delegation finally abandoned the innovation, accepting, in this regard, the usual practice.

But what is the usual practice [in regard to services] ? The distinguished *redacteur* of the project, Colonel Borel, who made every effort to obtain a satisfactory result, proposed to the *comité de redaction*, with the assent of its members, the following formula:

> Belligerents shall not demand of neutral persons services which relate directly to the war. Service of sanitation or of public health are excepted. Such services shall be compensated for in cash whenever possible. In default thereof, the proper receipt shall be given and payment made as soon as possible.

By this formula, the distinction drawn between war and other service disappears, being unnecessary after the withdrawal by the German delegates of the main prohibition in the first clause. Religious or ecclesiastic services, mentioned in the German proposition, and services relating to civil administration, to which the Austro-Hungarian amendment referred, were excepted, it being recognized that their general character did not permit their being included among the services having direct relation to war. And it was claimed that circumstances urgently demanded the exception of sanitary services and services for public health. The above quoted formula was so reasonable, and in such complete harmony with the general practice of nations, that of itself it could not cause any difficulty or complication.

Nevertheless, it was thought necessary to establish definite limitations restricting its application. Among other things, the desirability of making special provision for the case of a voluntary engagement on the part of a neutral was suggested. This immediately brought up the case of resident foreigners who enter military service by reason of special provisions of the Norwegian legislature, or on account of peculiar conditions in the Dutch and British colonies. The Belgian delegates also thought that the formula should not be applicable to strangers without a country (apelites), without any tie of nationality, or to those who can not show that they have complied with the recruiting regulations of their own country.

If the first of these restrictions seems proper, the others assuredly do not. To say that foreigners may be liable to military service by reason of special legislation of the country is equivalent to nations leaving their subjects or citizens to the arbitrary regulations of the place in which they may reside, and to renunciation of the defense and protection of nationals outside of their own territory, which is one of the important and legitimate functions of modern states. This expression has also the serious objection of appearing to include cases of dual allegiance, and of settling them in favor of the country in whose territory the persons may be. The solution involves a number of exceedingly grave problems, which only in part concern the law of nations and in part relate to national sovereignty.

On the other hand, to convert the loss of citizenship or national status into a title or right to augment the military forces of a government, giving it, by the action of the Peace Conference, legal sanction in war, may possibly be a necessity for certain nations of Europe which other states in the world are not called upon to share or admit. Otherwise there would come about a sort of a barrier against emigration for military reasons, since it would follow that any country could subject to military service any alien who could not prove that he had given such service in his own country. It is not strange, therefore, that these propositions excited much discussion in the subcommission and also when submitted finally as a formulated draft.

The exception regarding services required by the legislation of a state suffered a fate as curious as it was unlooked for. When submitted to the committee by the *redacteur* it was rejected by a vote of the majority. Being presented later by the English delegates in the commission, in submitting the report of the committee, it was approved by twelve votes to nine and three abstentions. The article therefore was drafted as follows:

> The provisions of the first paragraph of article 64 are not applicable to persons who may belong to the army of a belligerent state by reason of their voluntary engagement. Neither are they applicable to persons who may belong to the army of a belligerent state by reason of the legislation of such state.

When this article was read in the plenary session of the conference on September 7, 1907, it called forth formal reservations of the second paragraph by the Italian, Greek, French, Russian, Swedish, Swiss, Cuban, Servian, Austro-Hungarian, Brazilian, Montenegrin, and Persian delegations.

The result of these numerous reservations was that the project was referred back to the commission which had formulated it. At a meeting two days later the commission agreed, by thirty-two votes against seven abstentions, to omit these articles, with others to which we shall refer later. The problem, therefore, relative to the personal services which may be demanded of neutral persons remained without solution; but it should not be lost sight of that the difficulty concerned an exception to a fundamental principle upon which all the powers were in accord. There may be a part of terra firma voluntarily abandoned because of the indetermination of its boundaries. Thus some later conference, with more time and more skill, may perhaps fill the void which is left.

20. Much more difficult, because relating to almost irreconcilable differences in practice, were the questions with regard to the property of neutral persons in belligerent territory and in territory occupied by the belligerent. Leaving the questions of railroads for another paragraph, the German proposition and the report of the committee referred to war taxes; the use, destruction and damage of real and personal property; the expropriation of the latter; the employment of vessels; the requisition of their cargoes; and the indemnity to be paid upon all of these accounts.

The fundamental principle of the German project, which we have recited above, consisted in a claim that neutral persons were entitled to special regulation; while the British and French delegations thought they should be treated the same, with regard to their property, as the national in the territory of the belligerent, or as the enemy in enemy territory occupied by the belligerent. The former claimed that, inasmuch as war in our days is between state and state, and clearly distinguishes between neutrals and belligerents, neutrals should be protected, as far possible, from having to support the burdens of a military struggle which did not concern them as a duty. The latter maintained that war taxes must be imposed *ratione loci* and not *ratione personæ,* and that the remaining property of neutral persons should share the consequences of the war in return for the advantages which the aliens would have come in search of in seeking a residence in the foreign territory, and for the protection which they had received during times of peace.

The plenary conference did not decide this matter, since, except with regard to the use of vessels, the propositions, which were adopted by the committee, were voted down in the commission on the 4th of September, 1907, by thirteen votes to eleven, and ten abstentions. As to neutral marine trade, an article was drafted in committee in the following sense:

> Neutral vessels and their cargoes may be expropriated or used by a belligerent when they are engaged in river navigation in the belligerent territory or in enemy territory. Vessels habitually engaged in maritime service are excepted. In the event of expropriation, the indemnity shall be equal to the actual value of the vessel or of the cargo, and ten per cent more. In the event of the employment of the vessel, the ordinary compensation shall be made, together with an addition of ten per cent. These payments must be made immediately and in cash.

It is needless to discuss at length the reasons given in the subcommission and in the committee for this article although the discussions in the committee, particularly, which are not recorded, were very interesting. The proposition passed through the commission at first without any vote, but with explicit reservations on the part of England, Japan, Russia, France, Austria-Hungary, and China. In the conference of the 7th of September, 1907, the draft was returned to the commission and was suppressed two days later by the same agreement to which we have above alluded with regard to war services which may be demanded of neutral persons.

21. It will be recalled that article 70 of the German project authorized the belligerent to expropriate or use for military purposes, pending payment in cash, any neutral goods which may be found in its country. The questions which arose during the Franco-Prussian war, on account of railway material, moved the delegation of Luxemburg to propose another article to the following effect:

> The said authorization does not extend to material for public transportation coming from the territory of neutral powers, and which belongs to said states or to their concessionaries, and which can be identified as such.

As so precise a rule had no great probability of adoption, the delegation of Luxemburg submitted an alternative proposition as follows:

> The maintenance of pacific relations, and particularly of mercantile and industrial intercourse between the inhabitants of the belligerent states and those of neutral states, warrants special protection by the military and civil authorities. The belligerents will concede a sufficient period, at the opening of hostilities, so that the railway material belonging to neutral states and to their concessionaries may be carried to the country from which it came. The requisition of railway material belonging to neutral states or to their concessionaries shall not be made except to the extent that may be absolutely necessary. The quantity of railway material for which requisition is made and its use shall be reduced to the lowest minimum possible. Said material shall be returned in a brief period to the country of origin. When public railway material belonging to a neutral state or to its concessionary is requisitioned by a belligerent state any material of the belligerent state or of its concessionaries in the neutral territory may be seized as due compensation.

The Servian delegation deemed it proper to ask that the reciprocal right of the neutral state to seize the railway material of belligerents be exercised by each party at the same time and to an equal extent.

These propositions gave rise to an interesting debate in the subcommission and in the committee, and were supported by several addresses with full references and reasons by the delegate from Luxemburg, Mr. Eyschen. He did not propose to establish for neutral railway material an extension of time, such as is enjoyed by neutral vessels which the outbreak of the war surprises in an enemy port. Nor is the case identical, nor could the most urgent military necessities reconcile the practice under such a like principle. On the other hand, the fundamental justice is admitted of the rest of the proposition cited above, and the German delegate submitted to the *comités de redaction* and *d'examen* at the session of the 21st of August, 1907, a text which served as a basis for the article as it was finally adopted, and which contained the principle of compensation for the use of material of neutrals, which was not mentioned in the Luxemburg proposition. The article, drafted by the committee in the form which we shall copy later in full, passed without debate and met with unanimous approbation in the second commission and in the plenary session of the conference, to which it was in turn submitted.

22. Of all the propositions and amendments submitted concerning the condition of neutral persons in belligerent territory or in territory occupied by the belligerent, only four were adopted as rules, as we have seen, and only three related to the definition of a neutral and to the conditions by which he would lose the benefits of his neutrality, while the fourth related to railway material of neutrals in belligerent territory or in territory occupied by the belligerent, as a complement to article 54 of the rule of 1899 upon the laws and customs of war on land. In addition the commission submitted to the plenary conference two resolutions relating to the same subject.

The following is the final text of the four articles adopted:

> Article 16. The nationals of a state which is not taking part in the war are considered as neutrals.
>
> Article 17. A neutral can not avail himself of his neutrality:
>
> (*a*) If he commits hostile acts against a belligerent;
>
> (*b*) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.
>
> In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent state could be for the same act.
>
> Article 18. The following acts shall not be considered as committed in favor of one belligerent in the sense of article 17, paragraph (*b*):
>
> (*a*) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;
>
> (*b*) Services rendered in matters of police or civil administration.
>
> Article 19. Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

23. The results which the conference reached upon the subject of neutral persons in the territory of belligerents was, as we have shown, rather limited. Important questions remained unsettled but it was indispensable to omit them in order to reach any general agreement. The articles adopted have no transcendent value from the point of view of a complete codification, although they clear up certain difficulties and convert into the form of written law certain commonly recognized principles.

The article in regard to railways — the only article saved in the chapter relating to foreign property — is useful to nations with land boundaries and is based on just terms, making the best equivalent for the necessities of war and in the interest and right of neutrals. Therefore, its acceptance brings great credit upon the delegation of Luxemburg. It is to be observed that the final redaction only relates to railway material coming from neutral states, belonging to the said states or to companies or private persons. It has no other purpose than to facilitate the return of the compensation or the payment for the use of the cars and locomotives of a country which may accidentally enter the other state through the occasions of ordinary traffic.

The foregoing brief review of propositions and principles, including some opinions contrary to the principles adopted in the conventions, will show not so much the irreconcilable disagreements which the conference encountered on this subject as the necessity of completing those principles and of solving the difficulties on another and more fruitful occasion.

24. From the rules adopted touching the rights and duties of neutral powers and persons in land warfare, the general *comité de redaction* drafted the convention which has given rise to this paper,

which convention is quoted herein textually together with the other agreements of the conference.

Having set forth and elucidated these matters, as they were considered and understood in the commissions and committees, it might now be appropriate to take up and consider the provisions of the convention in the light of recognized theories and of the practical cases which the diplomatic history of the principal nations of the world can show. As this, however, would greatly lengthen our paper, and is moreover within the reach of all the students of public international law, it seemed to us more interesting, because as yet not so well known, to give the internal history of the convention and what might be termed its international negotiation.

Nevertheless, we may state for the benefit of the readers who do not wish to make for themselves the comparative study of the theories and practice established up to this time, that the Second Peace Conference at The Hague, by its agreement on land neutrality, has done much to overcome the serious difficulties which have hitherto arisen, has adopted in each case the best theories, and has not departed from the progress already made except by improving upon it or clarifying some question. Would the same might be said of the labors of the conference in regard to the other problems submitted to it!

Antonio S. de Bustamante.

# THE CENTRAL AMERICAN PEACE CONFERENCE OF 1907[1]

The Central American Peace Conference which met at Washington on November 14 and adjourned December 20, 1907, in accordance with the protocol between the Republics of Costa Rica, Salvador, Guatemala, Honduras, and Nicaragua, signed at Washington, September 17, 1907, is not only in accord with the general tendency of our times toward more helpful relations between neighboring nations, but is a direct outgrowth of a policy which has repeatedly led to similar conferences with a view to promote a better understanding and a more complete cooperation between the republics of Central America.

It was three centuries after its discovery by Columbus that Central America, or the Kingdom of Guatemala, severed the political ties which bound it to the mother country. On the 15th day of September, 1821, within a year after the separation from Spain, Central America was for a brief period annexed to Mexico under the Emperor Iturbide. The union with Mexico, however, was soon dissolved and the National Assembly which met in Guatemala on July 1, 1823, declared the unconditional independence of Central America, and later adopted the bases of a fundamental federal Central American constitution, which was duly promulgated at the City of Guatemala on November 22, 1824. The various constituent states also organized their respective state governments, and a federal government was duly inaugurated. It was, however, destined to be short lived.

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[1] The historical facts concerning the early attempts at union of the five Central American republics have been furnished by Mr. Francisco J. Yánes, Secretary of the International Bureau of the American Republics, and the account of the proceedings and results of the conference is based upon the Monthly Bulletin of the International Bureau of the American Republics for December, 1907, pages 1334-1373.

Owing in part to the inexperience of those who guided its destiny in the methods of federated representative government, in part to the dissatisfaction of some and the ambition of others, the first Central American Union ran its course within a few years. From 1838 to 1847 the various states withdrew from the Union, set up independent governments, and thereafter reaffirmed their complete separation by the promulgation of their respective national constitutions.

Nicaragua adopted its first constitution as an independent state in 1839. Since then there have been six other constitutions, the one in force being that of 1905.

Salvador became an independent commonwealth in 1839, and in 1856 assumed the title of a republic. Since the dissolution of the federal compact it has had six different constitutions, the first promulgated February 18, 1841, while the present constitution dates from August 13, 1886.

The constitution of Costa Rica, adopted on January 21, 1847, declared that Costa Rica, as one of the political entities of the Central American nation, was ready to reenter the federation whenever the other Central American states should negotiate another compact and agreement. Since 1847 Costa Rica has had the constitution of December 26, 1859, and that of December 7, 1871, which is now in force as amended in 1882, and subsequent dates.

Since the first constitution of Honduras, which was promulgated in 1848, there have been four other constitutions, the one now in effect being that of 1904.

Guatemala reaffirmed its separation from the Central American Union in 1851 in the "Constitutional act of the Republic of Guatemala," which was in force until January 29, 1855, when it was amended. On October 23, 1876, the so-called "Pro-Constitution of Guatemala" was framed by a constitutional convention held in the City of Guatemala. The constitution now in force was promulgated December 11, 1879, and put in operation March 1, 1880.

Notwithstanding the failure of the first federated Central American Republic, repeated efforts have been made to reestablish the Central American Union, so far without success. Scarcely had the first federation been dissolved, when in 1842 a convention composed of the Republics of Nicaragua, Honduras, and Salvador met at Chinandega, Nicaragua, and invited Guatemala and Costa Rica to join in establishing a national government, but neither of these Republics accepted the invitation. Two years later this tripartite government succeeded in bringing about the peace between Guatemala and Salvador, which were at war, and in the treaty of friendship and alliance signed April 4, 1845, by the Salvadorean and Guatemalan representatives both countries agreed to appoint two delegates each, to meet at Sonsonate, Honduras, for the purpose of agreeing upon the establishment of a national Central American authority, clothed with the duty of maintaining internal peace and directing the foreign relations of the Union. These delegates were also directed to invite Honduras, Costa Rica, and Nicaragua to join in this movement. For various reasons, however, this plan failed of success.

The Diet which met at Nacaomé, Honduras, in 1847, marks another step looking towards Central American union. The purpose of the meeting was to unite Honduras, Salvador, and Nicaragua in a bond of mutual benefit for the purpose of insuring their peace and independence. The Diet recommended to Honduras, Salvador, and Nicaragua, to be represented in the Constituent National Convention to be held at Tegucigalpa, Honduras, August 1, 1848, or at any other city selected by the delegates, and the representatives of the three countries signed an agreement for the establishment of a provisional national government. This pact, to which Guatemala and Costa Rica were invited to become parties, looked toward a permanent alliance between the three signatory states, but this attempt at federation was also unsuccessful.

The same countries, however, met again at Leon, Nicaragua, on November 8, 1849, and through their delegates concluded a treaty by which it was stipulated that the "National Representation of Central America," consisting of two plenipotentiaries for each State, was to meet at the city of Chinandega, Honduras, to elect a president and vice-president for the united countries. Costa Rica and Guatemala were also invited to join in this movement. The differences between Nicaragua and Great Britain on the Mosquito Coast question moved the three Central American countries to unite for mutual defense.

A similar sentiment inspired the Government of Honduras to invite Nicaragua and Salvador in 1852 to send delegates to Tegucigalpa for the purpose of meeting again as a National Diet, because of an alleged occupation of territory belonging to Honduras by Great Britain. The Diet met October 9, 1852, and provided for the union of the three Republics under the title "Republic of Central America."

These repeated failures to reestablish the Central American Union did not discourage renewed attempts. In 1862 Nicaragua endeavored to bring about a merger of all the states into one single body politic. Honduras and Salvador readily accepted, but Guatemala held aloof, notwithstanding the fact that the City of Guatemala had been selected as the capital of the Union. Again, in 1876 a congress of representatives of the five Central American States met in Guatemala for the purpose of perfecting a union. This new effort was also a failure on account of war breaking out at that time between Guatemala and Salvador.

In 1886 General Barillas, President of Guatemala, still believing in the possibility of forming a Central American union, invited the Presidents of Salvador, Honduras, Nicaragua, and Costa Rica to send their plenipotentiaries to the City of Guatemala, where jointly with a Guatemalan plenipotentiary they were to meet in congress, for the purpose of insuring peace, establishing confidence, and unifying the interests, aspirations, and tendencies of their respective countries. This congress met on January 20, 1887. Its principal work was the conclusion of a treaty of peace and amity among the five republics, a consular convention, and another for the extradition of criminals. It was also stipulated that a similar congress was to meet every two years, to carry on the work for union by peaceable means. This congress was to meet in the different capitals, in turn. The second congress met in San José, Costa Rica, in 1888, and a year after, as previously agreed upon, in the City of San Salvador, where a pact was concluded October 15, 1889, by which a provisional union was arranged looking toward the final merging of all the states into the "Republic of Central America."

This new effort also fell through because of a war between Guatemala and Salvador.

A further attempt was made by the States of Honduras, Nicaragua, and Salvador, by the treaty of union signed at Amapala, June 20, 1895, to form a confederation under the name of the "Greater Republic of Central America," which name was to be changed to "Republic of Central America" should Guatemala and Costa Rica voluntarily join the agreement then made. This treaty also provided for the meeting of a diet, charged principally with the maintenance of the friendly relations with other nations, arbitration of all questions pending among the signatory states, empowered to appoint and receive diplomatic and consular representatives, and finally to propose a scheme of definite union of the signatory powers, and submit such plan to a general assembly within three years after the date of the treaty. The Diet was convened, officials were appointed for the direction of affairs, and on August 27, 1898, the "Political Constitution of the United States of Central America" was approved by the General Assembly of the representatives of Honduras, Nicaragua, and Salvador. The new régime was about to commence when a revolution overthrew the Government of Salvador and the Union was once more defeated.

Another treaty of peace and compulsory arbitration was signed by the Governments of Costa Rica, Honduras, Nicaragua, and Salvador, at Corinto, Nicaragua, on January 20, 1902, creating an arbitration court, composed of a commissioner and a substitute for each contracting power, to hold office for one year. Art. XVIII of this treaty provided that in the desire that the convention might unite all the states of the Central American family, the signatory states should invite, either jointly or otherwise, the Government of the Republic of Guatemala to adhere to the stipulations of the treaty.

In 1906, the Treaty of the Marblehead (See Editorial Comment in this JOURNAL, I:141) was signed by the representatives of Guatemala, Salvador, and Honduras, in the presence of the representatives of the United States and Mexico. This treaty provided, among other things, that within two months from date of ratification a general treaty of peace, friendship, commerce, etc., was to be concluded between the three contracting parties, designating the Republic of Costa Rica as the place of meeting.

Acting on this provision, the Government of Costa Rica invited the three contracting parties and the Government of Nicaragua to send their respective delegates to meet in the City of San José. The contracting powers accepted the invitation and sent their plenipotentiaries, but Nicaragua did not accept, basing her refusal upon the ground that the arrangements of the treaty of peace and arbitration signed at Corinto January 20, 1902, above referred to, were sufficient and still in force.

The Treaty of San José was signed on September 25, 1906, by the representatives of Costa Rica, Guatemala, Honduras, and Salvador. Among the principal stipulations contained in this treaty is an agreement by the Governments of Salvador, Guatemala, and Honduras to appoint, for the settlement of all difficulties arising among them, the Presidents of the United States and Mexico as umpires to whom all such questions are to be submitted for arbitration. Other stipulations of this treaty seem to suggest the reestablishment of the Central American Union, such, for instance, as the provision binding the signatory powers always to unite "to foster their moral, intellectual, and industrial progress, thus making their interests one and the same, as becomes sister countries." Furthermore, the signatory states mutually agree to grant "native treatment" to one another's citizens residing within their borders. Merchant vessels of the various contracting countries are likewise favored and provision is made for the extradition of criminals. Finally, in order to "maintain peace and to forestall one of the most frequent causes of disturbance in the interior of the republics and of restlessness and distress among Central American people" the four contracting states agree not to allow "prominent political refugees to reside near the frontiers of the countries whose peace they seek to disturb."

On the same day, September 25, 1906, other conventions were signed by the same plenipotentiaries, providing for the creation of a bureau to be located in the City of Guatemala, and established not later than September 15, 1907, for the purpose of fostering intercourse among the signatory countries, and for the creation of a Central American pedagogical institute, in Costa Rica, as a means of securing "a common educational system, essentially homogeneous, tending to effect the moral and intellectual unification of the sister countries."

Disturbances have, however, continued in Central America and to such an extent has the peace of that portion of the world been threatened that the friendly mediation of the United States and Mexico became appropriate in the common interest of peace and good will. This tender of good offices was readily accepted by all the Central American states and their common effort to maintain peace and arrive at a definite understanding resulted in the protocol signed at the Department of State in Washington, on September 17, 1907, by the plenipotentiaries of all five of the Central American republics in the presence of the representatives of the United States and Mexico, providing for the Peace Conference which was held at Washington in November and December under the roof of the International Bureau of the American Republics.[2]

As agreed upon in Article I of the protocol, President Díaz of Mexico and President Roosevelt of the United States invited the five republics of Central America to meet in Washington in order to establish a basis of permanent peace between them. These invitations were accepted and delegates were chosen from the several republics.[3]

In addition, the Republic of Mexico designated Señor Don Enrique C. Creel, ambassador extraordinary and plenipotentiary to the United States, and the United States designated Hon. William I. Buchanan, as representatives from Mexico and the United States at the conference.

The building of the International Bureau of the American Republics was chosen as the place of meeting of the conference and two preliminary sessions under the presidency of Señor Don Joaquín Bernardo Calvo — Señor Dr. Don Angel Ugarte, secretary — were held on November 12 and 13, at which regulations for the orderly procedure of the conference were adopted.

On the 14th of November the first regular session of the conference was held, at which the delegates, the representatives of Mexico and the United States, and the Hon. Elihu Root, Secretary of State of the United States, were present. The meeting was called to order by Mr. Root, who addressed the conference as follows:

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[2] The text of this protocol will be found in the Supplement, I:406.

[3] For list of delegates see Treaty and Conventions, Supplement for this number of the JOURNAL.

*Mr. Ambassador and Gentlemen of the Five Central American Republics:*

Usage devolves upon me as the head of the Foreign Office of the country in which you are assembled to call this meeting together; to call it to order and to preside during the formation of your organization. I wish to express to you, at the outset, the high appreciation of the Government of the United States of the compliment which you pay to us in selecting the city of Washington as the field of your labors in behalf of the rule of peace and order and brotherhood among the peoples of Central America. It is most gratifying to the people of the United States that you should feel that you will find here an atmosphere favorable to the development of the ideas of peace and unity, of progress and mutual helpfulness, in place of war and revolution and the retardation of the principles of liberty and justice.

So far as a sincere and friendly desire for success in your labors may furnish a favorable atmosphere, you certainly will have it here. The people of the United States are sincere believers in the principles that you are seeking to apply to the conduct of your international affairs in Central America. They sincerely desire the triumph and the control of the principles of liberty and order everywhere in the world. They especially desire that the blessings which follow the control of those principles may be enjoyed by all the people of our sister republics on the Western Hemisphere, and we further believe that it will be, from the most selfish point of view, for our interests to have peaceful, prosperous, and progressive republics in Central America.

The people of the United Mexican States and of the United States of America are now enjoying great benefits from the mutual interchange of commerce and friendly intercourse between the two countries of Mexico and the United States. Prosperity, the increase of wealth, the success of enterprise — all the results that come from the intelligent use of wealth — are being enjoyed by the people of both countries, through the friendly intercourse that utilizes for the people of each country the prosperty of the other. We in the United States should be most happy if the states of Central America might move with greater rapidity along the pathway of such prosperity, of such progress; to the end that we may share, through commerce and friendly intercourse, in your new prosperity, and aid you by our prosperity.

We cannot fail, gentlemen, to be admonished by the many failures which have been made by the people of Central America to establish agreement among themselves which would be lasting, that the task you have before you is no easy one. The trial has often been made and the agreements which have been elaborated, signed, ratified, seem to have been written in water. Yet I cannot resist the impression that we have at last come to the threshold of a happier day for Central America. Time is necessary to political development. I have great confidence in the judgment that in the long course of time, through successive steps of failure, through the accompanying education of your people, through the encouraging examples which now, more than ever before, surround you, success will be attained in securing unity and progress in other countries of the New Hemisphere. Through the combination of all these, you are at a point in your history where it is possible for you to take a forward step that will remain.

It would ill become me to attempt to propose or suggest the steps which you should take, but I will venture to observe that the all-important thing for you to accomplish is that while you enter into agreements which will, I am sure, be framed in consonance with the most peaceful aspirations and the most rigid sense of justice, you shall devise also some practical methods under which it will be possible to secure the performance of those agreements. The mere declaration of general principles, the mere agreement upon lines of policy and of conduct, are of little value unless there be practical and definite methods provided by which the responsibility for failing to keep the agreement may be fixed upon some definite person, and the public sentiment of Central America brought to bear to prevent the violation. The declaration that a man is entitled to his liberty would be of little value with us in this country were it not for the writ of *habeas corpus* that makes it the duty of a specific judge, when applied to, to inquire into the cause of his detention, and set him at liberty if he is unjustly detained. The provision which declares that a man should not be deprived of his property without due process of law would be of little value were it not for the practical provision which imposes on specific officers the duty of nullifying every attempt to take away a man's property without due process of law.

To find practical, definite methods by which you shall make it somebody's duty to see that the great principles you declare are not violated, by which if an attempt be made to violate them the responsibility may be fixed upon the guilty individual — those, in my judgment, are the problems to which you should specifically and most earnestly address yourselves.

I have confidence in your success because I have confidence in your sincerity of purpose, and because I believe that your people have developed to the point where they are ready to receive and to utilize such results as you may work out. Why should you not live in peace and harmony? You are one people in fact, your citizenship is interchangeable — your race, your religion, your customs, your laws, your lineage, your consanguinity and relations, your social relations, your sympathies, your aspirations, and your hopes for the future are the same.

It can be nothing but the ambition of individuals who care more for their selfish purposes than for the good of their country that can prevent the people of the Central American states from living together in peace and unity.

It is my most earnest hope, it is the hope of the American Government and people, that from this conference may come the specific and practical measures which will enable the people of Central America to march on with equal step abreast of the most progressive nations of modern civilization, to fulfill their great destinies in that brotherhood which nature has intended them to preserve, and to exile forever from that land of beauty and of wealth incalculable the fraternal strife which has hitherto held you back in the development of your civilization.

Following this address the ambassador from Mexico said in part:

*Gentlemen of the Central American Delegations:*

Allow me to bid you all, in the name of the people and the Government of Mexico, which I have the honor to represent on this most solemn occasion, the heartiest welcome, and to express the sincerity of my good wishes for your personal welfare and for the success of the missions your respective governments have entrusted into your hands.

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Neither the United States nor Mexico craves territorial expansion; nor is either desirous of intervening in your affairs, nor do they ask aught but to see you peaceable, strong, and prosperous countries. Mexico and the United States are convinced that such will be the result obtained by your energy, patriotism, and good will, after honest deliberations, intent upon securing peace for the five Central American republics on the basis of eternal justice.

Peace has always been the greatest boon to mankind. But when population and elements of wealth increase, and the level of civilization becomes higher, and the principles of justice and respect for property become more solid; when a higher estimate is put upon the life of man, it is then that tranquillity becomes more valuable in the world, its rule controls as a supreme necessity, as the greatest of all blessings, the mainspring of patriotism, and the unmovable basis of national autonomy.

The world moves on. The various manifestations of progress reach everywhere, earthly civilization becomes universal, demanding that each and every people in the world share in its benefits. When civilization finds no barriers nor suitable surroundings, it directs to that spot all its energies and its life-giving elements of wealth. But when war, disorder, and extermination block the way and oppose the great force of civilization, then conditions becomes dangerous both at home and abroad; thence proceed retrogression and the elements of international difficulties.

The peoples of to-day cannot dwell in isolation linked as life is to the common cause of human progress, and it is only in the midst of peace that the preservation of national integrity can be conceived. When that support is wanting, autonomy is in danger, and the wrongs and the damage done may be irreparable.

The present tendency of civilized countries is clearly towards peace, as shown by the Hague Tribunal; by the several peace and arbitration congresses and conferences organized or to be organized in advanced nations; as advocated by the public press in all countries, irrespective of political parties, or religious creed; as taught in schools and universities. Peace is the yearning cry of humanity. No mistake could be greater, no blindness darker, than to oppose those tendencies. Any and all sacrifices seem small when made to obtain a solid, unmolested, firm peace.

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If I am not mistaken in my judgment of your affairs, your differences all rest upon issues which can be easily adjusted and, above all, which can be settled by pacific means. Boundary questions, questions of wrongs to citizens, territorial invasion, and many others, which cannot be prevented between adjoining countries, may be easily and peacefully settled according to such general rules as you may adopt at this conference, and civil or foreign wars will only come when unavoidable; and then as far apart as wars now occur in the civilized countries of the world, but not so frequently as they now take place among the savage element of uncivilized countries.

To attain these conditions it is necessary not to seek to gain advantages, not to claim predominance over one another, nor redress of wrongs, nor yet lose control of one's temper. This is not a battlefield, nor a strategical point. The object of this conference is nobler and loftier. It is to seek in good faith the means of doing justice. Your clear intelligence and patriotism will surely find it, and, when found, it must be embodied in a treaty of very long duration. This is what the world expects of the high representation of your respective governments; this is what Mexico and the United States of America expect, because they will, in perfect good faith, seal that treaty as a moral guaranty of an honest and steadfast purpose, as a token of love for peace, and as an evidence of confraternity, sympathy, and justice to the countries you represent.

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Gentlemen of the Central American delegations, may the treaty of Washington carry in its very soul the lofty ideals of the Latin race to which we belong, and may its form be as solid and strong as the great American people identified with us in this common work of order, civilization, and progress. May this be as perpetual a treaty as will always be the unchangeable good faith and love of peace of the two Republics, your friends, who have invited you to take up this humanitarian task.

To these addresses Señor Don Luis Anderson, Minister for Foreign Affairs of Costa Rica, on behalf of the conference, responded in part as follows:

*Your Excellencies:*

* * * * * * *

The solemn inauguration of the Central American Peace Conference by the honorable Secretary of State, on which occasion we have listened to the eloquent, wise, and kind words of his excellency the ambassador of the United Mexican States, is not only a symbol of American confraternity, but also will mark in the history of our people the moment of separation between the past and the future.

On the one hand, war and strife will sink into the past, while on the other peace, progress, and quiet loom up in the future. It is the beginning of an era in response to the urgent call of the spirit of the twentieth century.

Civilization cannot allow that in the family of nations there be one which does not work or does not bring forth for the common benefit the full contingent of its energies and of the immense wealth with which nature has endowed it, because all nations are jointly responsible in the process of human progress.

Central America, which is admirably situated between two continents, with an extensive coast line on both oceans, having an exceedingly rich soil, suitable for all kinds of products, with mountains of gold and silver, such wealth that one might think that nature took pride in being prodigal, spreading over those lands all its wealth — Central America, I say, is in duty bound to render to civilization, through universal interchange, all the benefits that its privileged situation demands. However, and I lament to say this, we are backward in paying this duty because of this unprofitable strife in which some of the republics have spent their energies and which has kept us estranged from the ideals our forefathers had in mind when they, regardless of sacrifice, gave us country and liberty.

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The names of Roosevelt and Diaz will always be remembered with gratitude by the humble citizens of those countries, the citizens whose hands are hardened by toil and whom the tropical sun has marked. They are those who will profit the most by stable peace, because it is the plain field hands who are compelled to exchange the plow for the sword, and they go to war, but they do not love war. Our countries are not war-fearing countries, and the only part they have played in the several wars which from independence to our day have stained the Central American soil with blood is that of dying like heroes — bravely, modestly — for a cause which they have never understood. The Central American wars have never been wars between nations; they have been wars between governments.

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If we in the Washington conference turn our eyes toward liberty, if we make provision here to insure that our countries, free from past errors, will start a new life of real democratic solidarity, if we could obtain that the governments of our five countries do not remain indefinitely in power but be both in their origin and in their acts a free expression of the will of the people, if we obtain that the rights of man — that noblest inheritance of the human race which is a part of all our constitutions but sometimes sadly forgotten — become effective, become something like the backbone of our institutions and our social and political organizations; in short, should we enter in all sincerity into a constitutional life, we would have done great good to our countries, and the generous intent of Presidents Roosevelt and Diaz would be materialized.

Let us strive to make a living reality of our respect for the liberty of the individual as well as of the liberty of the states. Let us admit and guarantee the government of the people for the people in every one of the Central American countries, and then peace will be insured and the road to our happiness and perfection will be clear. I believe I interpret the sentiment and the patriotic feelings of each and every one of the Central American delegates when I say that we have faith that we will reach that goal, and our gratitude to those who have aided us in this noble work will be sincere and eternal. Which among our nations will show so little love of country or such lack of patriotism as to refuse to ratify such true means of procuring us happiness?

After the preliminary work of examination of credentials the conference proceeded to elect permanent officers, as follows: President, Señor Don Luis Anderson, Costa Rica; secretaries, Señor Dr. Don José Madriz, Nicaragua, and Señor Dr. Don Salvador Rodriguez González, Salvador.

Fourteen sessions of the conference were held between November 14 and December 20.

Resulting from these deliberations eight conventions were agreed to and signed on the latter date. These conventions are: General treaty of peace and amity, additional convention to the general treaty, establishing a Central American court of justice, extradition, on future conferences (monetary), on communications, establishing an international Central American bureau, and establishing a pedagogical institute.

A careful analysis of the eight conventions adopted by the conference shows that the union of the Central American states into a federated republic was the goal constantly before the conference in all its sessions. It appeared, however, advisable to make haste slowly, to follow rather than to create public sentiment, so that the republics might rather drift into union than be forced into it by a single act. An act of union might seem to savor of revolution; the gradual development toward union in accordance with the desire of public sentiment would on the contrary be a peaceful evolution.

The conference recognized that peace is the great need of the Central American republics, and this peace should be based not upon force but upon the administration of justice. Hence, the convention for the establishment of a Central American court of justice in which each state should be represented and whose decisions should be binding alike upon government and citizen. The Supreme Court of the United States has been the great balance wheel of our institutions. It was felt that a court of justice would preserve equality of state and equality of right, but it was recognized that peace was improbable if not impossible as long as the causes of dissension remain. Therefore Article II of the general treaty of peace and amity declared "that every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said republics," and as the dispositions or measures tending to alter the constitutional organization of the republics arise largely from the personal ambition of political leaders who seek not merely to establish but to perpetuate themselves in power and to choose their successors, an additional convention was drawn up in which the contracting parties pledged themselves not to recognize (Article I of the additional convention to the general treaty) "any other government which may come into power in any of the five republics as a consequence of a coup d'état, or of a revolution against the recognized Government; so long as the freely elected representatives of the people thereof, have not constitutionally reorganized the country," and that the governments of Central America are recommended to "endeavor to bring about, by the means at their command, a constitutional reform in the sense of prohibiting the reelection of the president of a republic, where such prohibition does not exist," and "to adopt all measures necessary to effect a complete guaranty of the principle of alternation in power". (Article III of the additional convention to the general treaty).

The geographical situation of Honduras has made it in times past the object of aggression, for its possession or control seems to be of fundamental advantage to the contending Central American republics. Article III, therefore, of the general treaty of peace and amity, provides that "Honduras declares from now on its absolute neutrality in event of any conflict between the other republics; and the latter, in their turn, provided such neutrality be observed, bind themselves to respect it and in no case to violate the Honduranean territory." This article eliminates a perennial and specific source of trouble, but Article II of the additional convention seeks to remove a general evil, for it provides that in case of civil war no government of Central America shall intervene in favor of or against the government of the country where the struggle takes place. As an additional guaranty against participation in civil war the general treaty of peace and amity forbids persons of whatever nationality to initiate or foster revolutionary movements against any of the republics (Article XVII) and neither the "head men or principal chiefs of political emigrations, nor agents thereof," shall be permitted to reside in the departments adjacent to the prospective scene of their revolutionary activity (Article XVI). But these measures look into the future, rather than the past, and in the interest of peace and quiet the contracting republics bind themselves to respect the inviolability of the right of asylum aboard the merchant vessels, of whatever nationality, anchored in their ports, and "only persons accused of common crimes and by order of the competent judge, after due legal procedure, can be taken from them" (Article X of the general treaty). It is further provided that public instruments executed in one of the contracting republics shall be valid everywhere if valid according to the laws of the republic in which they were executed. (Article XIV of the general treaty.) Article XV bearing on the same question is so important that it should be quoted in full:

> The judicial authorities of the contracting republics shall carry out the judicial commissions and warrants in civil, commercial, or criminal matters, with regard to citations, interrogatories, and other acts of procedure or judicial function.
>
> Other judicial acts, in civil or commercial matters, arising out of a per-

> sonal suit, shall have in the territory of any one of the contracting parties equal force with those of the local tribunals and shall be executed in the same manner, provided always that they shall first have been declared executory by the supreme tribunal of the republic wherein they are to be executed, which shall be done if they meet the essential requirements of their respective legislation, and they shall be carried out in accordance with the laws enacted in each country for the execution of judgments.

In other words, the general treaty looks to peace based upon the administration of justive as a permanent status, and by the removal of causes of past controversy seeks to guarantee the peaceful development of the respective countries.

But it is not merely the removal of causes of controversy that engaged the attention of the conference. By removing artificial barriers, the convention looked upon the inhabitants of the respective republics as essentially one people and provided for equality of treatment of citizens of one in the territory of the others, both in political rights and privileges and in the educational and professional training necessary for the understanding and application of such rights and privileges. Therefore a pedagogical institute was to be established in Costa Rica, with separate sections for men and women, for the professional education of teachers.[4]

Another convention establishes an international Central American bureau, to be located in Guatemala, in order to "develop the interests common to Central America" and "to take charge of the supervision and care of such interests." The first paragraph of this convention, set forth in full, will show the wide scope and possibilities of such an institution:

> The following Central American interests are recognized as being those to which special attention should be paid:
>
> 1. To combine every effort toward the peaceful reorganization of their mother country, Central America.
> 2. To impress upon public education an essentially Central American character, in a uniform sense, making it as broad, practical, and complete as possible, in accordance with the modern pedagogical tendency.
> 3. The development of Central American commerce and of all that may tend to make it more active and profitable, and its expansion with other nations.

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[4] For the provisions, see the convention for the establishment of a Central American pedagogical institute, Supplement to this number.

4. The advancement of agriculture and industries that can be developed to advantage in its different sections.

5. The uniformity of civil, commercial, and criminal legislation, recognizing as a fundamental principle the inviolability of life, respect for property, and the most absolute sacredness of the personal rights of man; uniformity in the system of custom-houses; in the monetary system, in such manner as to secure a fixed rate of exchange; general sanitation, and especially that of the Central American ports; the confidence in the Central American credit; uniformity in the system of weights and measures; the definition of what constitutes real property, in such a firm and unquestionable manner as will serve as a solid foundation for credit and permit the establishment of mortgage banks.

In addition to these two great institutions the conference recommended "the creation of a practical agricultural school in the Republic of Salvador, one of mines and mechanics in that of Honduras, and another of arts and trades in that of Nicaragua." (Article IV, general treaty of peace and amity.) The steps taken for the professional education of the citizens of the republics can not be too highly commended, for upon the education of the people the industrial and, in large measure, the political development of the republics must depend. The establishment of Central American institutions in each one of the republics is as educationally sound as it is politically wise; because, while working for the common good, each republic is given a special interest in the institution established in its midst.

In accordance with the ideas set forth in the previous paragraph, that education should be Central American, it is provided in Article VII of the general treaty that professional degrees obtained in one country shall be recognized in the others, and all professionally qualified shall have the right to exercise their professions in the respective countries of Central America.

A further step in the unification of Central America, consciously taken and with a full understanding of its import, was the convention concerning future Central American conferences, the preamble and first article of which require quotation in full:

> The Governments of the Republics of Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, desiring to promote the unification and harmony of their interests, *as one of the most efficacious means to pre-*

*pare for the fusion of the Central American peoples into one single nationality,* have agreed to conclude a convention for the naming of commissions and for the meeting of Central American conferences, which shall agree upon the most efficacious and proper means to the end of bringing uniformity into their economical and fiscal interests; and to that end have named as delegates:

* * * * * * *

ARTICLE I.

Each one of the contracting governments obligates itself to name within one month, counted from the last ratification of this agreement, one or more commissions, which shall occupy themselves preferably with the study of all that concerns the monetary system of their respective countries, especially in relation to those of the other states, and interchange amongst them; and, besides, the study of everything relating to the custom-house systems, the system of weights and measures, and other matters of an economic and fiscal nature which it may be deemed expedient to make uniform in Central America.

And finally, moved by the desire to come into closer relations and to open up their countries not merely to the citizens of each republic or to the republics as a whole, but also to the outside world, a convention on communications was adopted by which, through the appointment of commissioners, the respective countries might cooperate in the realization of the Pan-American Railway and the establishment of various lines of communication between the separate republics, such as lines of "steamships, submarine cables, telegraph lines, wireless stations, telephones, and everything that may tend to bind closer their mutual relations." (Article IX of the convention on communications.) This convention is based upon the broad principle that people are enemies, or at least unfriendly, because they do not know each other, and that every means of communication, whatever be its kind or nature, is a means of peace.

The conference could not well hope to establish law and order upon a permanent basis unless some means were created to bring offenders against law and order to justice, not merely as a punishment to those who committed crime but as a deterrent to those who might seek safety in flight. The conference therefore drew up and signed a convention of extradition in which the subject was treated broadly and upon principle, and in which doubtful questions which might lead to controversy were resolved in advance. Article I provides who shall be extradited and Article II provides who shall not be, thereby viewing the subject from both sides. These articles are as follows:

### ARTICLE I.

The contracting republics agree to deliver up reciprocally the individuals who may take refuge in the territory of one of them and who in the other may have been condemned as authors, accomplices, or abettors of a crime, to a penalty of not less than two years of deprivation of their liberty, or who may have been indicted for a crime which, in accordance with the laws of the demanding country, carries a penalty equal to or greater than that above stated.

### ARTICLE II.

Extradition shall not be granted in any of the following cases:

1. When the evidence of criminalty presented by the demanding party would not justify, according to the laws of the place where the fugitive so charged is found, his apprehension and commitment for trial, if the offense had been there committed.
2. When the offense charged is of a political character, or, being a common crime, is connected therewith.
3. When under the laws of the demanding country or of that of asylum, the action or the penalty has been barred.
4. If the accused demanded should have been already tried and sentenced for the same act in the republic wherein he resides.
5. If in the latter, the act because of which extradition is requested should not be considered a crime.
6. When the penalty corresponding to the crime for which extradition is requested shall be that of death, unless the demanding government binds itself to apply the next lower penalty.

Article III deals with the vexed question as to whether a crime ceases to be a crime merely because the criminal has a political purpose in mind. For example, is the murder of the chief of a nation any the less a murder because he happens to be the chief executive of a country? Article III represents the sober sense of the question.

The attempt against the life of the head of the government or anarchistical attempts shall not be considered a political crime, providing that the law of the demanding country and of the country of which extradition is requested shall have fixed a penalty for said acts. In that case extradition shall be granted, although even when the crime in question shall carry a penalty of less than two years of imprisonment.

Article IV likewise represents the weight of opinion in holding that a nation shall not be bound to surrender its own citizens, but the nation in which the fugitives are found obligates itself to "try them for the infractions of the penal code committed in any of the other republics, and the respective government must communicate the corresponding proceedings, information, and documents, and deliver the articles which constitute the *corpus delicti,* furnishing everything conducive to the investigation necessary for the expedition of the trial."

Articles V and VI wisely provide that violations committed by the fugitive in the place of his refuge shall be punished and sentence served before extradition will be granted for a prior offense committed in the extraditing country (Article V), and if several countries make request for the same fugitive priority of application shall determine the surrender (Article VI). From this brief analysis it will be seen that the extradition convention reflects distinct credit upon the conference.

These conventions would have been sufficient in themselves to justify the calling of an international conference to deal with Central American affairs, but the crowning glory is the convention for the establishment of a Central American court of justice.

The convention in its preamble happily says that the court is established "for the purpose of efficaciously guaranteeing their rights and maintaining peace and harmony inalterably in their relations without being obliged to resort in any case to the employment of force." And the constitution of the court, to consist of a judge from each of the contracting nations, is broad enough to permit it to assume jurisdiction whether the controversy arises between the contracting states or whether it be a controversy arising from the violation of treaties or conventions and other cases of an international character submitted by individuals with or without the support of the home government, provided, however, that the remedies which the laws of the respective country provide against such violation shall have been exhausted and that a denial of justice shall be shown. (Articles I and II.)

Nor is this all. Article III provides that —

> It shall also take cognizance of the cases which by common accord the contracting governments may submit to it, no matter whether they arise between two or more of them or between one of said governments and individuals.
>
> It shall also have jurisdiction over cases arising between any of the contracting governments and individuals, when by common accord they may have been submitted to it.

The court therefore is not merely a court of arbitration as it would be were sovereign states the only suitors; but it is a court of justice because individuals may apply to it for a judicial remedy to be administered or found by judges acting under a sense of judicial responsibility. The court is not created to decide cases which governments or individuals may be pleased to refer to it, but the contracting states (Article I)—

> bind themselves to submit all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be, in case the respective departments of foreign affairs should not have been able to reach an understanding.

The duty to submit is in this case obligatory, but the jurisdiction of the court is broadened so that—

> The court may likewise take cognizance of the international questions which by special agreement any one of the Central American governments and a foreign government may have determined to submit to it. (Article IV.)

In other words, the court is not to be solely a court for the settlement of disputes between the governments of Central America and between governments and individuals of Central America, but it may become an international court in the largest sense of the word by reason of the jurisdiction especially conferred upon it by Article IV, just quoted. The court is to be permanent, composed of five judges, with its seat in the city of Cartago, in the Republic of Costa Rica, but it may sit elsewhere provided a change be deemed necessary or advisable.

Article XX provides that the contracting governments formally bind themselves to obey, and compel to be obeyed, the orders of the court, furnishing all the assistance that may be necessary for their best and most expeditious fulfillment. The court is authorized by Article XXII to —

> determine its jurisdiction, interpreting the treaties and conventions germane to the matter in dispute, and applying the principles of international law.

and in Article XXI it is provided that —

> In deciding points of fact that may be raised before it, the Central American Court of Justice shall be governed by its free judgment, and with respect to points of law, by the principles of international law. The final judgment shall cover each one of the points in litigation.

For the purpose of reaching an agreement the concurrence of at least three justices is necessary. (Article XXIII.) The judgment when pronounced must be signed by all the justices of the court and countersigned by the secretary, and in case of doubt as to the meaning of the judgment "the tribunal may declare the interpretation which must be given to its judgment." (Article XXIV.)

Theorists insist upon a sanction for the decision of an international court, and, if any express sanction be wanting, the advisability of the institution is either questioned or its judgments are denied the power and effect of judgments of a municipal court. Article XXV of the convention supplies a moral sanction, the only sanction possible in the present condition of international development:

> The judgments of the court shall be communicated to the five governments of the contracting republics. The interested parties solemnly bind themselves to submit to said judgments, and all agree to lend all moral support that may be necessary in order that they may be properly fulfilled, thereby constituting a real and positive guaranty of respect for this convention and for the Central American Court of Justice.

And, finally, the plenipotentiaries proposed an article for the consideration of the legislatures of their respective countries, which, if adopted and incorporated in the convention, would much enlarge its scope and therefore its usefulness:

> The Central American Court of Justice shall also have jurisdiction over the conflicts which may arise between the legislative, executive, and

judicial powers, and when as a matter of fact the judicial decisions and resolutions of the national congress are not respected.[5]

To the powers of Europe, to the great powers of the world, who struggled with partial success, for four months at The Hague, to establish a court of arbitral justice, the young republics of Central America may recall the scriptural phrase: "A little child shall lead them."

As the opening pages of this article set forth in considerable detail the various attempts toward union and the establishment of a permanent state of affairs it may be asked whether these conventions may not share the fate of their predecessors, which were discarded while the ink was still wet upon them. He is a bold if not unwise man who would pose as a political prophet, but it should be borne in mind that the previous treaties were concluded solely by the republics of Central America, and that they failed to establish a permanent state of affairs largely because they rested upon a public sentiment limited in extent, with no friendly guaranty from without. In the present case, the treaties and conventions would seem to be the crystallization of a public spirit and sentiment already existing, and that the two great Republics lying to the north have not only lent their friendly aid in the negotiation of the treaties and conventions, but are prepared by peaceful and proper means to guarantee their execution. It is true that the republics of Central America must stand by themselves, but it is none the less true that the moral support and encouragement of Mexico and the United States should not be overlooked. The past is indeed past, but the future is a future of hope and encouragement.

JAMES BROWN SCOTT.

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[5] As the president of the conference, Mr. Luis Anderson, Minister for Foreign Affairs of the Republic of Costa Rica, is to contribute an article upon the Central American Court of Justice, it would be as ungracious as it would be needless to enter into further details of this important convention.

# THE PEACE CONFERENCE OF CENTRAL AMERICA

So much has already been said about the Peace Conference of Central America, which recently met in Washington, that some may deem it unnecessary to say anything more about its aims and projects; but we feel that, very important as all its plans are, one of them is so particularly momentous that we can not help devoting to it a few serious observations.

It is well known that this conference was the realization of the hope and the fulfillment of the plans of two very able and very distinguished statesmen — the President of the United States and the President of Mexico — who, in their devotion to the cause of universal peace, did all in their power to make it successful. The delegates, moved by the laudable purpose to establish perpetual peace in the five republics of the Isthmus, subscribed, in the course of their deliberations, to the following compact:

That a Central American court of justice be constituted and maintained, which shall act as arbitrator and last tribunal of appeal in all questions and controversies that may arise among the republics of Central America, no matter what these questions and controversies may be, or what may have given rise to them, in case the respective departments for foreign affairs should not have found a common ground for an understanding.

The principal feature in the conception and plan of the Central American Court of Justice is that it shall not at all be a mere commission of arbitration, but a genuine judicial tribunal, whose work shall be to sift evidence, consider arguments, and pronounce judgment in all questions that may be brought before it, acting, of course, in accordance with rigid justice and equity, and with the principles of international law. This form of international arbitration is, in our opinion, the only royal road to the definite triumph of the generous and noble idea; for, as has been very wisely said by Mr. Elihu Root, one of the ablest diplomatists of the present day:

> What we need for the further development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility. We need for arbitrators, not distinguished public men concerned in all the international questions of the day, but judges who will be interested only in the question appearing upon the record before them. Plainly, this end is to be attained by the establishment of a court of permanent judges who will have no other occupation and no other interest but the exercise of the judicial faculty under the sanction of that high sense of responsibility which has made the courts of justice in the civilized nations of the world the exponents of all that is best and noblest in modern civilization.

It is understood that the Central American Court of Justice shall be fully independent; that the sittings shall be held in the town of Cartago, situated in the central tableland of Costa Rica; that its members shall be appointed by the legislative bodies of the Central American republics; that they shall be selected from among the best jurists of the respective republics, moral character and professional ability being made the principal qualifications; that they shall have no special connection with their respective governments; that they shall be charged with no mandate or other commission that might interfere with the purity of their motives, the uprightness of their acts, and the equity of their decisions; that in the country of their appointment they shall enjoy the personal immunity of magistrates of the supreme court of justice, and in the other contracting republics shall have the privileges and immunities of diplomatic agents; that concerning questions of law the court shall decide in accordance with the principles of international law, and concerning questions of fact in accordance with its own judgment; in short, it is understood that the Central American Court of Justice shall represent the national conscience of Central America, as is aptly expressed in the thirteenth article of the compact. The interested parties have solemnly bound themselves to submit to the judgments of the court, and have agreed "to lend every moral support that may be necessary" in order that those judgments may be properly fulfilled.

This Court of Justice, the first tribunal of its class in the history of civilization, shall be, it is hoped, a strong and durable defense for international peace and fraternity in Central America; it shall be the beacon to attract the hearts and minds of all intelligent Central Americans, causing the five sister republics to advance hand in hand toward the lofty eminence of a higher progress than that to which they have hitherto aspired.

The establishment of the Central American Court of Justice will be the practical realization of the ingenious plans formulated and recommended by the American delegates at the Second Peace Conference at The Hague, plans which, it will be remembered, were received with enthusiastic applause, though unfortunately they had no immediate success. The Court of Justice in Cartago will be, in some degree, the child of that bright idea, the happy performance of that which was a happy thought.

What must strike an intelligent observer is the eminently practical nature of the project introduced by the American delegates at The Hague, and it is no wonder that the arguments and suggestions of those able diplomatists were received so favorably; indeed, it is no wonder that the seed then planted is already about to yield fruit, and we feel certain that, little by little, the idea will take root in the hearts of the nations, and that the ultimate result will be the grand success of a great and valuable institution dedicated to the work of combating international discord and misery, and of promoting international peace and prosperity.

The Central American Court of Justice, the partial fruit of the good seed sown by the American delegates, shall be, as much as possible, in keeping with the American character and with American traditions; and, if we do not deceive ourselves, what has been so auspiciously begun will be continued with the energy, perseverance, and dexterity that can not but insure the utmost success.

A great modern philosopher says, very characteristically, that every new idea is in a minority of one against the whole world. It is beyond all doubt that even the best conceptions and schemes, even the best plans and projects, have to go through their period of probation; they have to prove that they are good before they receive the suffrages and the applause of the majority; nor is it necessary to insist very much on a truth that is so obvious in the pages of history, and that is so generally known. This is the case in the industrial world, in the scientific world, in the political world — in every sphere of human life. This has been the case with the great inventors, the great reformers and other pioneers of progress; it has been the case even with the great speculators in abstract science — nay, at times even with great innovation in literature and the fine arts. The idea appears — a new thing in an old world; it is like the voice in the wilderness; it is the light that shineth in darkness, and the darkness comprehendeth it not. At first it is hardly understood; perhaps it is misinterpreted, misrepresented, grossly attacked, shamefully ridiculed, unmercifully satirized. But it fights against all opposition, nevertheless; and, when its term of probation is past, when it has shown that it is what it claimed to be, it is maintained and applauded by a grateful and admiring nation, perhaps by a grateful and admiring world. The stone that the builders refused becomes the corner-stone of the temple.

Though a long and severe probation has its serious drawbacks, it is in the nature of things, and it is often just, that the new thing should be compelled to show its worth before it is accepted and extolled; and the poet does not counsel unwisely when he says, "prove before ye praise." This is a practical world, requiring useful works and not empty words; therefore, words and schemes and plans must show that they are pregnant with what Bacon calls "fruit" before they gain our acceptance and praise.

This was the case, for instance, with His Majesty the Emperor of Russia, who proposed and fathered the meeting of the First Peace Conference of The Hague in 1899, and the effects of whose very humanitarian plans and propositions are now eagerly awaited by the whole thinking world. Those effects may not be seen to-day, nor yet to-morrow, but they will certainly be seen at last, for nothing good can die, and we venture to affirm that, at no very distant date, the work of the First Peace Conference of The Hague will be the fundamental basis of the political life of the nations. Though by no means visionary optimists, we are yet far from being gloomy pessimists, and in spite of the incredulity of those who express want of confidence in our hopes and plans we can not help regarding the prospect before us with much complacency, believing as we do in the attainment of the noblest ideals of humanity, and knowing that though man is not perfectible, he certainly is improvable.

It must be admitted, however, that at times the pessimists seem to have no mean case; nor do they refrain from trying to make the most of it. They point to the Russo-Japanese war, one of the most costly and sanguinary wars of modern times, and exclaim triumphantly:

> Is this the peace predicted by the Czar? Is this the international brotherhood which the Hague Conference labored to secure? Ten years have not passed since the deliberations of that wonderful assembly, and, behold! instead of the olive branch of peace we have wars and rumors of war!

But the circumstance that the tragic conflict was inevitable shows that the Czar was gifted with no small share of foresight when he proposed that there should be an international assembly to consider the ways and means of diminishing the barbarities of warfare and the chances of war, and the great Monarch showed that he was not at all destitute of universal benevolence when he even avowed that the goal of all his endeavors was the entire abolition of war — the dawn of that world-wide peace which will be one of the greatest blessings of civilization. That peace can not be attained in a day, but we may do all that lies in our power to hasten its advent. Let us not attempt to deprive a statesman of his well-merited fame. To the Czar belongs the glory of ackowledging and proclaiming his belief in the possibility of an international bond of union; to him belongs the glory of making the first important step toward an era of universal peace. Continuing his good work, we shall approach nearer and nearer to that grand future, and posterity will continue the march —

> Till the war-drum throbs no longer, and the battle flags are furl'd
> In the parliament of man, the federation of the world.

No step in the march of progress is made precipitately, and it is useless trying to hurry mankind along. The historical process of ideas requires a slow gestation in order that they may have healthful life and proportion. No nation can be stopped suddenly and compelled to make a hasty change in its course; and no wise statesman will attempt in one day to ingraft new institutions in the life of a nation, and require the nation to submit at once to new ideals, to accept at once new habits of thought, new customs of every-day life. A nation on the eve of a great reform may be compared to a railway train that is about to make a very remarkable change in its course, to enter upon a new road and travel in a new direction; it must slacken speed before it can take the new route. If the engine-driver tries to make the change suddenly, there will probably be a very frightful accident. In the same manner, a nation must not be required to change its course in a day, without any previous preparation, else there will be revolutionary violence. For a nation is a very delicate machine; it is fraught with inherited passions and prejudices, instincts and impulses, and is always acting in accordance, more or less, with certain creeds, customs and formulas, and is often led by the heart rather than by the head. He who would be a great reformer must first become a careful student of human nature, and must know that wariness is inseparable from wisdom.

The advocates of peace are well aware of this, and they are not trying to reform the world in a day. They are not idle theorists planning the creation of a new mankind, but practical statesmen fully sensible of the limits of human ability; they are not trying to beatify human nature, but to ameliorate human conditions. Their great work was begun at the First Peace Conference of The Hague in 1899, which prepared the way for the Second Peace Conference, and for all the peace conferences that may ever meet, until the last and grandest of these conventions shall exhibit to a reformed, intelligent, and aspiring world the sublime spectacle of the ultimate triumph of peace. That conference — if we may indulge for a moment in prognosticating so far a result — that great body, having new functions, using new means to accomplish the most far-reaching plans, will have its power based on the respect and gratitude and common sense of mankind.

The Second Peace Conference of The Hague, which was first suggested by the President of the United States, and to which the Czar invited the representatives of all the nations, marked a decided advance in the work of the advocates of peace.

The First Conference had established a court of arbitration with power to pronounce decision in any dispute that might arise between two or more of the nations. But this court was permanent only in name; it had no fixed residence anywhere, and whenever prompt action and summary proceedings were necessary it proved to be inefficacious.

In the Second Conference of The Hague, the Americans proposed to establish a *judicial* court of arbitration, which should be composed of the representatives of all the nations that signed the protocol. It was intended that in the bosom of this court should be deputed a tribunal of delegates having a permanent residence, being always ready to attend to every new matter at the earliest possible date, so that the court of arbitration might be able to deal with it in a business-like manner. We are confident that the future peace conferences will recall this motion with deep interest and sympathy, and that it will become at last the ultimate law of the nations.

On reviewing the history of mankind it may seem strange that, after a series of so many great improvements, after so many salutary reforms and spirit-stirring revolutions, the civilized nations should be, in one very important respect, almost on a par with the ancient savages. We have made amazing progress in all the physical sciences, and wherever we turn we see the domination of man over matter. We have wrested precious secrets from the bosom of nature; we have made the elements subservient to our wishes; we have analyzed the component parts of the material universe; we have detected the existence of the infinitesimal worlds around us; we have attempted to bring the planetary system within a few leagues of our observation; we have tried seriously to penetrate the veil that conceals the Infinite and Eternal; we have reached a very high grade of government and law, of civil and intellectual liberty. But, in spite of all this, we still see the fiends of rivalry and jealousy on the frontiers that separate the political entities, and as ready to make havoc and destruction among them as in the warlike days of old.

But in truth we are going farther and farther from the savage state; and, if war is lasting longer than other barbarous customs and practices have lasted, it is because the desire to fight and to dominate by physical force and by cunning is more deeply implanted in our nature than many other desires; therefore it is that it must be very resolutely and uncompromisingly combated. When the Renaissance dawned in Europe it was no longer possible for "Arma virumque" to be the central subject in the universe, and to-day an up-to-date Virgil would sing "Arts and the Man," or "Thoughts and the Man," or, better yet, "The Works of Man."

Arbitration is an excellent medium for preserving peace and good will, and international arbitration may be considered a heavenly blessing to man. It is the only institution that can and will be successful in the campaign against warlike customs and theories.

But it must be impartial, free from motives of petty interest; it must be invested with incontrovertible moral authority, and must have the profound respect of the nations; it must be a high court of justice against whose decisions there can be no appeal; it must be free from corruption, and from suspicion of corruption. The circumstance that many statesmen of our day have conceived the idea of such arbitration says much for the wisdom that is to be found in modern statecraft; and among those statesmen who have distinguished themselves by their zeal and their exertions in the cause of peace Mr. Elihu Root, the eminent American Secretary of State, holds a very conspicuous place.

In having had the honor to be a factor in establishing the first international court of justice, Central America has been singularly fortunate; but the glory of having initiated this beneficent idea will be forever associated with the names of the American delegates at the Second Peace Conference of The Hague, whose great project still stands, and, we venture to say, will never be forgotten.

We feel certain that the next international peace conference of The Hague will find the Central American Court of Justice established on a firm foundation, performing all its high duties in a manner honorable to itself and to the republics of the Isthmus, continuing, with unabating zeal, the noble work of union and consolidation, revered as a sacred depository of wisdom and learning, virtue and truth, administering justice with equal hand, and universally acknowledged to be the representative of the conscience of civilized humanity.

Luis Anderson.

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## EDITORIAL COMMENT

### LOUIS RENAULT.

On December 10, 1907, the Nobel Prize was awarded to M. Louis Renault, of France, and Ernesto Teodore Moneta, of Italy, President of the Peace Society of Italy.

By his will Alfred B. Nobel, the inventor of dynamite, bequeathed his fortune, estimated at $9,000,000, as a fund, the interest of which should be distributed yearly to those who had signally contributed to the good of humanity. The interest is divided into five equal shares, of which one is awarded "to the person who in the domain of physics has made the most important discovery or invention, one to the person who has made the most important chemical discovery or invention, one to the person who has made the most important discovery in the domain of medicine or physiology, one to the person who in literature has provided the most excellent work of an idealistic tendency, and one to the person who has worked most or best for the fraternization of nations and the abolition or reduction of standing armies and the calling in and propagating of peace congresses."

The peace prize, with which this note is concerned, has been awarded, since the institution of the prize, as follows: In 1901, to Henri Dunant (Swiss) and Frédéric Passy (French); 1902, to Elie Ducommun and Albert Gobat (both Swiss); 1903, to W. R. Cremer (English; Sir William Randall Cremer, M. P., created Kt., 1907); 1904, to The Institute of International Law, the first award to an institution; 1905, to Baroness Bertha von Suttner (Austrian); 1906, to Theodore Roosevelt, President of the United States; and in 1907 it was divided between Louis Renault (French) and Ernesto Teodore Moneta (Italian).

While the recipients of the prize have in various fields of activity amply justified the great honor conferred upon them, the award of 1907 appeals with peculiar interest to students of international law, for it is the first award made to a professor of the science, thereby justifying the claim of its votaries that international law makes for peace.

More fortunate than Grotius, the founder of international law, who, driven from his home, found honor and employment in Sweden, the recognized head of our modern science has not only come to honor in Sweden, as did the founder, but is idolized by his fellow-countrymen at home.

The year 1907 has been a year full of honor for Louis Renault. On the 10th of March, 1907, his colleagues and friends, students and former students of the Faculty of Law of Paris and of the Free School of Political Sciences, presented him with a beautiful medallion bearing upon the one side the portrait of the gentle and genial teacher and friend, and on the other the inscription, "To Louis Renault, in testimony of services rendered in the teaching and practice of international law: his students, his colleagues, his friends."

A few months later — to be accurate, from the 15th day of June to the 18th day of October — he dominated the Second Hague Conference, not as a Frenchman or as a member of the French delegation, but as a citizen of the world, the trusted friend and adviser of his colleagues.

On the 10th day of December the Nobel prize committee publicly proclaimed him the friend of humanity.

## SECOND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law will hold its second annual meeting at Washington in the New Willard Hotel, on April 24 and 25, 1908. The tentative program adopted by the Executive Committee follows:

*Morning Session, April 24.*

President's address: The Sanctions of International Law.
Topic: Should the violation of treaties be made a Federal offense?

*Afternoon Session, April 24.*

Topic: In how far should neutrals and neutral property in belligerent territory be freed from supporting the charges of military operations?
How far should loans raised in neutral nations for the use of belligerents be considered a violation of neutrality?

*Evening Session, April 24.*

Topic: To what extent and under what conditions is a nation justified in renouncing the reserves of independence, vital interests, and honor in general and special arbitration treaties?

*Morning Session, April 25.*

Topic: Codification: Do international, particularly neutral, interests require the codification of international law, more especially the codification of international maritime law?
Are the practices of nations sufficiently general to permit this codification, for example, in the matters of contraband, blockade, etc.?

*Afternoon Session, April 25.*

Topic: The Prize Court. The organization, jurisdiction, and procedure of an international court of prize.

Possible additional question: The influence of the Supreme Court in the development of international law.

The session will end with a banquet at the New Willard Hotel, at which informal and unreported addresses will be delivered by various members of the Society and invited guests.

It will be noted that the questions selected for discussion have been largely suggested by the recent Hague conference, although the Society does not limit itself to the work of the conference. Two of the questions, and not the least important, were not discussed at the conference, and indeed one of them is so peculiarly American that consideration of it would have been out of place in that august assembly. Reference is made to the topic "Should the violation of treaties be made a Federal offense?" To state the question is at once to show the importance and difficulty of the subject. A nation should not be responsible for that which it cannot prevent, and yet internal and local difficulties are not a good plea to the breach of an international duty. The attention of

Congress has frequently been called to the need of some such sanction to international agreements, and it is not improbable that some action will ultimately be taken.

The second question deals with loans raised in neutral nations for the use of belligerents. If provisions destined to a point of military equipment and arms and ammunition destined to enemy territory be considered contraband, the question not unnaturally presents itself, "Should not loans raised in neutral nations for the use of belligerents be a violation of neutrality?"

The subject of neutrals and neutral property in belligerent territory was considered at the recent Hague conference, but the conflict between the principles of nationality and domicile prevented substantial agreement, although the subject was very thoroughly discussed.

Not merely was arbitration accepted, but the nations represented at The Hague recognized unanimously the principle of obligatory arbitration. The incorporation of this abstract principle in the concrete form of a treaty proved impossible, owing to the opposition of a determined minority against a general arbitration treaty, although substantially all the representatives approved the negotiation of special treaties.

The reserves of independence, vital interests, and honor were discussed at great length and subjected to an examination such as they probably had never before received. It is improbable that the question will be less interesting to the Society than it was to the conference.

The questions of codifying maritime international law and the establishment of a prize court are so intimately connected that many believe that the court can not well be established without previous codification of the law to be administered. The conflict between continental and Anglo-American jurisprudence will doubtless lead to an interesting exchange of views.

It is well known by layman as well as lawyer that the Supreme Court of the United States passes upon international law necessarily involved in judicial questions presented to it, but the rôle which the Supreme Court has played in the development of a sound and rational body of international law is known only to the specialist. A careful consideration of the Supreme Court in the matter of international law will show that in many respects it is not only a national court as far as the United States is concerned, but that its decisions involving international law have gone far to remove doubt and lend precision to much of the accepted international law of the present day.

The publication of the proceedings of the first meeting has been delayed by the prolonged absence of the managing editor, but they are in press and will be distributed to the members of the Society before the second annual meeting. It is not too much to say that they are valuable in themselves and in not a few instances are contributions to the subjects under discussion. It is hoped that the proceedings of the second annual meeting will be equally valuable.

## EXPATRIATION AND PROTECTION OF NATURALIZED AMERICANS ABROAD AND IN TURKISH DOMINIONS

The act of March 2, 1907 (see Supplement, I:258), dealing with "The Expatriation of Citizens and their Protection Abroad, 1907," provided, in section 2:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.
>
> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

The intent of this section is clear, namely, to free the Government from the onerous duty of protecting indefinitely naturalized citizens who take up their abode permanently in foreign parts. The duty of state and citizen is mutual — the state protects the citizen, and the citizen protects the state. Should the citizen withdraw himself from the state of his adoption it becomes difficult or impossible for him to render to the state those services for which the state in return guarantees and protects him at home and abroad. He ceases to contribute to the state; he becomes a drain upon the state, and looks to it only or chiefly when in trouble in foreign parts he needs the aid of the government from which he has withdrawn himself and his property.

The statute does not and can not mean that a naturalized citizen shall not leave this country. It does and must mean that on leaving this country he should have the *animus revertendi.* When he has renounced the intent to return it is only fair to permit the state to renounce the duty to protect. If the naturalized citizen expatriates himself by naturalization in a foreign state or when he takes an oath of allegiance to a foreign state he determines expressly his relationship to the country he has left, but he may by a less public and unequivocal renunciation of allegiance forfeit his claim to American citizenship.

The experience of the past half century teaches that hordes of foreigners come to this country to become naturalized with the intent to return to the country of their origin in order to enjoy in the home country the protection of American citizenship. The naturalization of such persons in no wise adds to the strength or greatness of this country, and their presence in the country of their origin is undesirable and irritating.

The so-called "Bancroft treaties" of 1868 provided that:

> If a German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally: if an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany he shall be held to have renounced his naturalization in North Germany. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country. (Treaties in Force, p. 593.)

In such a case the citizenship is forfeited by the residence without an opportunity to show the ultimate intent to return. This provision enables the home country to protect itself from the fraud committed upon it by naturalization in a foreign country for the express purpose of enjoying upon return immunities and exemptions from the duties incident to citizenship. A fraud is likewise perpetrated upon the United States, and there is no reason why this Government should protect a renegade.

It may often happen that a foreigner comes to this country, is naturalized, and after naturalization takes up a permanent residence in a state other than the country of his origin. In such a case the naturalized citizen not only renounces allegiance to the home county, but he withdraws himself from the United States; he ceases to contribute to it and it would seem that in so doing he commits a fraud upon the country of his naturalization. He might have emigrated in the first place to the land of his permanent abode, but in such case he would have had the protection of the home country; not the protection of the country in which he was naturalized. He thus chooses protection, not citizenship, and there seems no reason why such a one should be carried indefinitely upon the rolls of American citizenship.

Residence abroad forfeits citizenship, and the forfeiture is the act of the naturalized citizen, not an act of administration. He is made a citizen in a judicial proceeding; he is not deprived of his citizenship by an act of administration. It is his own act, and the statute allows administrative tribunals to safeguard and protect his citizenship, provided he overcomes the presumption of continued residence by satisfactory evidence to a diplomatic or consular officer of the United States that his residence abroad is not meant to be permanent or of such a nature as to forfeit American citizenship.

> When a naturalized citizen of the United States has resided for two years in the country of his origin, or for five years in any other country, this fact creates a presumption that he has ceased to be an American citizen, but the presumption may be overcome by his presenting to a diplomatic or consular officer proof establishing the followings facts:
>
> (a) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or,
>
> (b) That his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or,
>
> (c) That some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.
>
> The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient. (Circular of the Department of State, April 19, 1907.)

The residence of the naturalized citizen in foreign parts is bound to give rise to complications and seeming hardship, but the solution is infinitely more complicated by naturalization in the United States of subjects of countries in which the United States claims and exercises extraterritorial rights, for a citizen of the United States in taking up his residence in an extraterritorial country is regarded, at least for certain purposes, as residing within the United States and being subject to the jurisdiction of the United States to the exclusion wholly or in part of the local laws. The case may thus present itself, and indeed frequently does, of a subject coming to the United States from a country in which we exercise extraterritorial rights and privileges, becoming naturalized, and thereupon returning to the country of his origin. He knows little or no English. He has not acquired American habits of thought. He returns to the land of his origin, mixes with his former friends and associates, but by virtue of his naturalization claims exemption as an American citizen from local rules and regulations. His children, born after his return, he considers American citizens, and the United States may be called upon to protect generations who have never been in the United States, who perform no duties to it, and merely seek its protection in time of trouble.

Extraterritoriality, however, is a right which the United States may claim and exercise. It is, however, for the United States to determine when it will exercise this sovereign right, and it is a question not of international law but of constitutional law of the United States under what circumstances and how far the right recognized will be claimed and exercised. As far as the United States is concerned it is not a question of international law but of internal or constitutional law. The United States, therefore, may decline to extend to naturalized citizens in extraterritorial regions indefinite protection, or indeed the status of citizen. By extending section 2 of the act of March 2, 1907, to extraterritorial regions, the Secretary of State has placed naturalized citizens of the United States upon an equal footing, and granted to them the same rights and no greater. The text of the circular follows:

DEPARTMENT OF STATE,
*Washington, December 11, 1907.*

*To the Diplomatic and Consular Officers of the United States in Turkish Dominions.*

GENTLEMEN: Section 2 of the act of March 2, 1907, and paragraph 144 of the Diplomatic Instructions and Consular Regulations as amended by the Executive order of April 6, 1907, relative to expatriation and the protection of Americans abroad, are applicable to American citizens who reside in Turkish dominions.

Therefore, a naturalized American citizen formerly a Turkish subject who returns to Turkish dominions and there resides for a period of two years will be presumed to have ceased to be an American citizen, and a naturalized American citizen not formerly a Turkish subject who resides in Turkish dominions for five years will be presumed to have ceased to be an American citizen.

The presumption may be overcome in either case by his presenting to a diplomatic or consular officer of the United States proof establishing the following facts:

(*a*) That his residence in Turkey is solely as a representative of American trade and commerce and that he intends eventually to return to the United States to reside; or

(*b*) That some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside permanently in the United States immediately upon the removal of the preventing cause; or

(*c*) That he resides in a distinctively American community recognized as such by the Turkish Government; or

(*d*) That he resides in Turkish dominions as the regularly appointed missionary of a recognized American church organization:

The evidence required to overcome the presumption of expatriation must be of the specific facts and circumstances which bring the alleged ciitzen under one of the foregoing heads, and mere assertions, even under oath, of any of the enumerated reasons existing will not be accepted as sufficient.

Whenever evidence shall be produced to overcome the presumption of expatriation as indicated in this instruction the depositions and other proofs must be made in duplicate, one copy thereof being sent forthwith to this Department, and if the proofs have been presented to a consular officer he shall notify the embassy at Constantinople of the name of the person and of the facts concerning his residence abroad.

This instruction, in so far as it relates to the presumption of expatriation from residence in Turkey, supersedes the corresponding parts of the Department's circular instruction of April 19, 1907, entitled "Expatriation."

I am, etc., ELIHU ROOT.

The situation of naturalized missionaries in China will undoubtedly call for regulation and the extension of section 2 of the act of March 2, 1907, with necessary modifications, for Chinese subjects may not become citizens of the United States, which guarantee protection without permitting a fraudulent use of American citizenship.

## THE REMISSION OF A PORTION OF THE CHINESE INDEMNITY

The joint resolution introduced in the Senate on January 9, 1908, is as follows:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is hereby authorized to consent to a modification of the bond for twenty-four million four hundred and forty thousand seven hundred and seventy-eight dollars and eighty-one cents, dated

> December fifteenth, nineteen hundred and six, received from China pursuant to the protocol of September seventh, nineteen hundred and one, for indemnity against losses and expenses incurred by reason of the so-called Boxer disturbances in China during the year nineteen hundred, so that the total payment to be made by China under the said bond shall be limited to the sum of eleven million six hundred and fifty-five thousand four hundred and ninety-two dollars and sixty-nine cents and interest at the stipulated rate of four per centum per annum, and that the remainder of the indemnity to which the United States is entitled under the said protocol and bond may be remitted as an act of friendship, such payments and remission to be at such times and in such manner as the President shall deem just.

The facts of the Boxer disturbances in China are too well known to be set forth in detail, but it is otherwise with the object for which the Boxer indemnity was asked and received by the Department of State, and the manner in which private claims have been dealt with by the Department in pursuance of that object. For this reason the following brief observations upon the distribution of the indemnity, as well as a summary of the various steps in the negotiations relating to the indemnity, may be of general interest.

By the joint note of December 22, 1900 (see Senate Document No. 67, 57th Cong., 1st sess., p. 59), the powers presented their demands to the Imperial Chinese Government. The note begins:

> During the months of May, June, July, and August of the present year serious disturbances broke out in the northern provinces of China and crimes unprecedented in human history — crimes against the law of nations, against the laws of humanity, and against civilization — were committed under peculiarly odious circumstances. The principal of these crimes were the following:

Under four heads are placed the detailed grievances. These are, first, the murder of the Germain minister; second, the attack and siege of the legations, participated in by Chinese troops; third, the murder of the chancellor of the Japanese legation, the attack upon and murder of other foreigners at Peking and in several provinces, and the *pillage and destruction of their establishments;* fourth, the desecration of foreign cemeteries, the resistance of Chinese troops to the relief expedition, etc.

Then follows the list of conditions of peace imposed by the powers. The sixth item thereof, which provides for the indemnification of private parties, stands as follows:

> Equitable indemnities for governments, societies, companies, and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners.

China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

An international commission on indemnities was appointed to lay down the principles upon which private claims should be dealt with. They submitted their report to the diplomatic corps and it was approved ad referendum. The Department of State (instruction to Peking No. 515, May 3, 1902) expressed its judgment that the rules thus laid down would be found suggestive and instructive. They were not, however, agreed to by all the powers, and were not, therefore, binding *internationally.*

In the instruction referred to above the Department also remarked that all merely speculative or imaginary claims or elements of damages were to be excluded from consideration.

Item C of this report (see Senate Document No. 67, 57th Cong., 1st sess., p. 106) records the manner in which it was deemed proper that private claims should be dealt with. It says:

MERCHANTS. — *Private property of merchants.*

Real estate destroyed or damaged, including temporary housing and repairs, expert surveys for determining amount of damages, etc.

Furniture.

Usual and inevitable salary of employees whose services could not be turned to account.

Unavoidable office expenses not made good in consequence of the events.

Stock in trade, goods, provisions, samples possessing pecuniary value, destroyed or deteriorated.

Extraordinary cost of storage and reshipment.

Debts recognized as valid which can no longer be recovered.

Bank notes lost or which cannot be cashed.

Specie, bills payable at sight.

Broken contracts of all descriptions, losses suffered in consequence of the non-execution of contracts entered into for articles of exportation or importation.

Deposits of money in telegraph offices or in banks. Advances to Chinese merchants who have become insolvent in consequence of the events.

Extraordinary cost of insurance rendered necessary by the events referred to.

Goods requisitioned for foreign troops for defensive works.

When the two American commissioners were appointed to investigate and determine American claims, they were given the following instructions, from which it will be seen that the rule quoted above was adopted on behalf of the United States to govern the action of its commissioners (Mr. Conger to Mr. Bainbridge, No. 1135, March 14, 1902):

In compliance with instruction No. 435, dated January 14, 1902, of the Department of State, I hereby designate you and Consul J. W. Ragsdale, of Tientsin, as commissioners to investigate and determine what amount should be allowed on each and all of the claims of citizens of the United States against the Chinese Government, growing out of the so-called "Boxer" uprising of 1900; and also on the claims of Chinese who, during the same events, suffered in person or property in consequence of their being in the service of citizens of the United States.

This commission will meet first in Peking, and proceed thence to such other localities as the exigencies of careful and intelligent examination demand.

Reasonable notice of the sittings of the commission in the several localities should be given to the claimants in advance.

The commission will be governed by the rules and practices usually required in proving and allowing claims of citizens of the United States under like circumstances; together with the regulations prepared by the committee on indemnities and approved by the representatives of the powers in Peking on March 13, 1901.

The commissioners will make a report on each claim, reciting the evidence of citizenship and of the fact and amount of loss or damage upon which the claim is based.

Their recommendations will be submitted for revision to the United States minister in China, and the whole will be subject to the final revision and approval of the Department of State.

The following is quoted from the final report of the American commissioners, addressed to the minister at Peking and dated November 17, 1902:

Indemnity claims have been filed by American merchants for goods destroyed, for losses through breach of contracts, through the death, disappearance, or insolvency of Chinese debtors, through the general interruption of business, depreciation in value of stock, and for extraordinary cost of storage and insurance. Interest has been claimed on capital employed in carrying stock rendered idle in consequence of the disturbances.

The commission has allowed as compensation for goods destroyed their actual value at the time of destruction. It has recognized rights vested by existing contracts and allowed compensation for the actual injury sustained through broken contracts due to the events, including expense of carrying undelivered merchandise, counting interest as part of such expense. But the commission has disallowed contractual claims where the contracts have been ascertained to be capable of fulfillment through the continued solvency of parties. Claims for losses through the general interruption of business have not been allowed; nor has interest been allowed on capital invested in goods for sale in open market not contracted for in delivery. Losses resulting from debts recognized as valid but no longer recoverable because of the death, disappearance, or bankruptcy of Chinese debtors due to the uprising have been compensated. Extraordinary cost of storage and insurance has been allowed.

The above will perhaps make clear the object for which the Boxer indemnity was asked and received and the general manner in which, in so far as private claims are concerned, it has been devoted to that object.

The various steps in the negotiations relating to the indemnity were as follows:

*December 22, 1900.*

The foreign representatives sent in a joint note consisting of twelve articles setting forth certain demands.

Article VI stated that China should pay equitable indemnities for states, companies or societies, private individuals and certain Chinese, etc.

*December 30, 1900.*

The foreign representatives received a reply to their note of the 22d, embodying an imperial decree dated the 27th, accepting all of the twelve articles.

*January 7, 1901.*

Foreign representatives formulated their twelve articles into a protocol and submitted this to the Chinese plenipotentiaries for signature.

*January 16, 1901.*

Each foreign minister received from the Chinese plenipotentiaries a copy of the aforesaid protocol duly signed and sealed, and also a copy of the imperial decree accepting all of the demands.

*May 7, 1901.*

The foreign ministers submitted statement to China showing their losses to be 450,000,000 taels. This joint note was not a demand for the above-named amount, but was sent to the Chinese plenipotentiaries to enable them to give formal expression as to the limits of China's ability to pay and the means she proposed taking.

*May 11, 1901.*

Reply of Chinese plenipotentiaries *re* indemnity of 450,000,000 taels, proposing monthly method of payment of above amount for thirty years, but begging that total be reduced.

*May 28, 1901.*

A list of the indemnities asked by the foreign powers until the 1st of July and prepared by the committee on the payment of indemnities was circulated by the dean of the diplomatic corps among his colleagues. The amount given as representing the total claim of the United States was $25,000,000, or 34,072,500 taels. In the opinion of the committee, as stated in the dean's note, the total indemnity would not, when adjusted, exceed 450,000,000 taels.

*May 30, 1901.*

A note from Chinese plenipotentiaries to dean of diplomatic corps accepting 450,000,000 taels.

*May 30, 1901.*

A note from Chinese plenipotentiaries to dean of diplomatic corps accepting 450,000,000 taels, with interest at 4 per cent., for the indemnity embodying an imperial edict dated the 29th of May covering the above amount.

*September 7, 1901.*

Final protocol signed by plenipotentiaries of all the powers in which it is agreed that the indemnity should be paid in thirty-nine annual installments, with interest at rate of 4 per cent per annum.

Article 6 (*b*). The service of the debt was to take place in Shanghai as follows:

"Each power shall be represented by a delegate on a commission of bankers authorized to receive the amount which shall be paid it by the Chinese authorities designated for that purpose, to divide it among the interested parties, and to give a receipt of the same."

Article 6 (*c*). "The Chinese Government shall deliver to the dean of the diplomatic corps a bond for the lump sum, which shall subsequently be converted into fractional bonds bearing the signature of the delegates of the Chinese Government designated for that purpose. This operation and all those relating to issuing of the bonds shall be performed by the above-mentioned commission, in accordance with the instructions which the powers shall send their delegates."

John K. Moir, of the International Banking Corporation in Shanghai, was chosen the delegate of the United States on the commission of bankers at Shanghai.

*October 13, 1901.*

The bond for the lump sum of 450,000,000 taels was delivered by the Chinese plenipotentiaries to the dean of the diplomatic corps, in compliance with paragraph (*c*) of Article VI of the final protocol.

*June 14, 1902.*

At a meeting of the representatives of the powers held in Peking on the 14th of June an agreement was signed declaring a definite apportionment of the indemnity and accepting on behalf of their governments such apportionment.

The United States took 32,939,055 taels, or $24,440,778.81 gold, with interest at 4 per cent per annum from July 1, 1901.

*May 18, 1904.*

The original fractional bond was signed by the commissioners of the Chinese Government and the commissioners of the United States Government, and was subsequently filed in the Department of State under cover of a letter from the International Banking Corporation of the above date.

*July 2, 1905.*

A new method of calculating payments and interest was presented in the form of a collective note by the representatives of the powers and subsequently agreed to by China.

*December 15, 1906.*

New bond based on collective note of July 2, 1905, signed and subsequently forwarded to the Department of State.

*January 11, 1907.*

Chinese Government was notified that henceforth the United States' share of the payments under the indemnity is to be paid direct to the United States Treasurer instead of through the International Banking Corporation of Shanghai.

The bond with the International Banking Corporation has since been canceled, owing to the above arrangement.

Following is a summary of the successive steps taken in the settlement of claims of American companies, societies, and individuals, and certain Chinese, for losses and damages growing out of the disturbances of 1900; schedule of the claims paid, etc.:

*September 2, 1901.*

Minister Conger transmitted to the Department copy of a letter addressed to him by certain American citizens having claims against the Chinese Government, requesting information as to the status of their claims and the procedure to be adopted in establishing them.

He suggested that many of the claimants should submit to a considerable reduction and that the local facts and conditions surrounding many of the claims rendered it very desirable that their examination should be made in China by some one familiar with the situation and local values. He expressed the hope also that an early adjustment of these claims would be reached.

One hundred and forty-six claims had up to this time been brought to the attention of the Department of State and the legation at Peking, most of them consisting of bare statements of facts by the claimants and estimated amounts of loss or damage, unaccompanied by evidence.

*January 14, 1902.*

The Department concurred with the legation that many of the claims should be reduced and that their investigation should be made in China by some one familiar with local conditions. The minister was instructed to designate one person from the legation and one from the consular service who would investigate the claims and determine what amount should be allowed in each case. The recommendations of these commissioners were to be submitted to the minister for revision, and the whole to be subject to the final revision and approval of the Department of State.

The commissioners were required to make a report on each claim, reciting the evidence of citizenship and of the fact and amount of loss or damage upon which the claim was based.

The commissioners were to be allowed from the indemnity paid by China their reasonable and necessary expenses while engaged in this work and such additional compensation as was reasonable and equitable. Due publicity through consuls and other officers was to be given all claimants of the establishments of the commission and the nature of its work.

*March 14, 1902.*

Minister Conger reported the designations of the persons who were to constitute the commission — Messrs. William E. Bainbridge, second secretary of legation at Peking, and James W. Ragsdale, American consul-general at Tientsin. The minister further expressed his views as to the extent and difficulty of the commissioners' task.

Minister Conger, in an instruction to the commissioners on the above date, said: "Reasonable notice of the sittings of the commission in the several localities should be given to the claimants in advance."

*May 3, 1902.*

The legation was instructed to forward to the Department, from time to time and as soon as passed on, all claims in order that the sums awarded could be distributed as speedily as practicable. The Department also suggested that as much of the work as possible should be done at or near Peking. The regulations prepared by the committee on indemnities and approved by the representatives of the powers in Peking on March 13, 1901, were not accepted by all the powers, and were therefore binding on none. However, it was believed by the Department they might be suggestive and instructive to the commission.

The indemnity in each case was to be fully and substantially compensatory, excluding all merely speculative or imaginary claims or elements of damages.

*November 17, 1902.*

The commission submitted its final report to the minister.

Its members were designated by the minister on March 14, 1902, and they began the work of examination of claims on May 5, 1902.

The Chinese Government, having recognized its responsibility for the Boxer outbreak, agreed to pay, pursuant to Article VI of the collective note of the powers, dated December 22, 1900, "equitable indemnities for governments, societies, companies, and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners."

The commission was not authorized to deal with losses sustained by the Government of the United States.

Two hundred and thirty claims for indemnities were filed with the commission by citizens of the United States, aggregating $3,308,036.18. These figures include $39,254.72 which represents the total amount of claims submitted to the commission by Chinese in the employ of Americans.

In a general way these claims may be classified as follows:

I. Claims of missionary societies and individuals.
II. Commercial claims.
III. Death claims.

The total amount disallowed or withdrawn was $1,804,385.69. The amount allowed on claims was $1,383,650.49. The amount of interest allowed, $130,642.39; thus placing the total amount allowed by the commission on private claims at $1,514,292.88. This amount, however, has been increased through additional awards by the Department of State subsequent to the completion of the commission's work, so that the total amount, including both American private claims and certain Chinese claims, the latter being $17,669.60, now aggregates $1,994,929.18. The maximum estimate required by this Government to meet the claims of its citizens and of certain Chinese under this heading was placed by the Department at $2,000,000; $1,994,929.18 having been paid out on this account, there remains in the Treasury Department an unexpended balance of $5,070.82.

*November 19, 1902*:

Legation transmitted to the Department final report of the commission.

*January 27, 1903.*

Department congratulated the minister and Commissioners Bainbridge and Ragsdale on the successful termination of their joint labors.

Amount of indemnity, principal, $24,440,778.81.

(Under the plan of amortization adopted this sum — carrying with it interest at 4 per cent per annum — is payable in irregular annual installments, extending over a period of thirty-nine years, the last payment falling due in 1940.)

It is estimated that the maximum amount required by this Government to meet its expenses, incident to the relief of the legation in 1900, and claims of citizens and others, will be as follows (revised estimates):

| | |
|---|---|
| War Department | $7,186,310 75 |
| Navy Department | 2,469,181 94 |
| Claims of citizens, corporations, societies, and others. | 2,000,000 00 |
| Total | $11,655,492 69 |

| | |
|---|---|
| Amount as stated above reserved by the Department to meet the claims of corporations, societies, and individuals, citizens of the United States and others; expenses of claims, commission, etc | $2,000,000 00 |
| Of this sum there has been expended to date | 1,994,616 76 |
| Gross unexpended balance | $5,383 24 |
| Adjusted claims not yet paid | 312 42 |
| Net balance | $5,070 82 |

| | |
|---|---|
| The Treasury Department has received to date, on account of principal and interest | $6,518,034 75 |
| The claims of societies, individuals, etc., adjusted and paid | 1,994,929 18 |
| Net unexpended balance at present in a separate account with the Treasury Department | $4,523,105 57 |

The expenditures of the War Department and the Navy Department, incident to the uprising of 1900 in China, are met in the ordinary course.

Deducting from the amount at present in the Treasury Department the $5,070.82, which is the unexpended balance of the amount reserved for private claims, the remainder is $4,518,034.75. As the expenses of the military and naval branches of the Government in China in 1900 were included in the regular military budget of that year, it would appear from the above that the last-mentioned sum may be disposed of by Congress as it may see fit.

## CONSULAR ADMINISTRATION OF THE ESTATES OF DECEASED NATIONALS

The case of Wyman, Petitioner (191 Mass., 276), printed in Volume I, page 520, of this JOURNAL, raises an interesting, not to say difficult, question concerning the jurisdiction of consuls over the estates of those of the consul's nationals who die in the foreign state from which the consul holds his exequatur. The books lay it down that the care of such estates is one of the well-established rights or duties (depending upon the view-point) with which a consul is vested or charged. The general law has, however, left the details of the consul's powers to be determined either by the respective national customs or laws, or by international agreement. Accordingly, not only are there no uniform settled rules that govern the question among all nations, but no one nation has a uniform rule that will apply to all its own consular affairs with its fellow nations. Indeed, a reading of the treaties suggests that each two contracting powers have met the various questions involved uninfluenced by the custom of other nations and in much the way that seemed to be required by the surrounding circumstances of the particular negotiations in progress, though, as the analysis will show, and as would be expected, it is possible to make a more or less general classification of the various consular rights and duties under the treaties.

A number of reasons readily suggest themselves for the diversity of stipulation noted, but the one that appears to control the contracting powers in the making of these conventions is the degree of political development that obtains in the respective countries. Among the elements of this development that seems to have been most closely scanned are the stability of the respective governments, the legal systems obtaining in them, the respect entertained by the people for their government and legal system, and the efficiency and integrity of the executive and of the courts. Accordingly, the widest consular powers seem usually to be found in conventions made either by two powers very low in the scale of political development or between two powers that are polar in such development.

The following rough and incomplete analysis of some American treaties will serve to show the truth of this in regard to the jurisdiction conferred upon our own consuls, and also to indicate the general range and nature of such jurisdiction over the estates of the consul's deceased nationals, which jurisdiction may indeed at times be practically unlimited.

It may be said, roughly, that under our treaties consuls may be empowered to administer upon the estates not only of intestates but of those dying testate. Moreover, they may have the right either to take charge of the estate and completely wind up its affairs, either under an appointment as administrator by a local court or by virtue of the treaty provision itself, or they may take charge of the estate temporarily, pending the appointment of an administrator by the proper local tribunal. In administering such an estate the consul may be obliged to administer it according to the law of the foreign country or according to the law of the national's native state. Under some treaties the consul is authorized to appoint an agent to exercise his powers in these matters. Again, while the consul under most treaties may perform his duties unassisted, other treaties require that he shall call to his aid one or more disinterested fellow nationals of the deceased. Indeed, some treaties provide that under proper conditions nationals not consuls may officiate in the winding up of a decedent's estate. Other treaties do not permit the consul to administer upon the estate at all and allow him only to take charge of the estate pending the proper appearance of absent and even minor heirs. Perhaps the extreme is reached in those treaties which, at the same time that they provide that not only may a consul intervene and entirely wind up the affairs of an estate, but that any national may also, in the absence of a consul, exercise the same powers, provide, further, that such an administration may be according to the laws of the native state of the deceased.

The following are the usual provisions concerning these matters that are to be found in the American treaties:

*First.* — As to those treaties providing for jurisdiction over the estates of both testates and intestates:

The consular convention with Austria-Hungary, 1870, article 16, provides that —

> In case of the death of a citizen of the United States in the Austrian Hungarian Monarchy, or of a citizen of the Austrian Hungarian Monarchy in the United States, without having any known heirs or testamentary executors by him appointed, the competent local authorities shall inform the Consuls or Consular Agents of the State to which the deceased belonged, of the circumstance, in order that the necessary information may be immediately forwarded to the parties interested.[1]

It is evident from this article, (1) *semble,* that the consular jurisdiction attaches where the individual dies without a will; (2) that the jurisdiction attaches to those dying without any known heirs; (3) that the jurisdiction attaches to those dying testate where the will names no executors; (4) that the consular jurisdiction in such cases is confined merely to informing the parties interested, the consul seeming to have no part in the administration of the estate itself; (5) that under this convention the duty of the local authorities toward the estate of the deceased foreigner is fulfilled when it notifies the consul of the death of his national.

Like provisions as to (1), (2), (3), (4), above, are to be found in the conventions with Belgium,[2] Germany,[3] Great Britain,[4] Greece,[5] Guatemala,[6] Italy,[7] Netherlands,[8] Roumania,[9] Servia,[10] and Spain.[11]

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[1] Treaties in Force, 1904, 47.

[2] Consular convention, 1880, art. 15, Treaties in Force, 1904, 75, 79.

[3] Consular convention, 1871, art. 10, Treaties in Force, 1904, 279, 282.

[4] Convention as to tenure and disposition of real and personal property, 1899, art. 3, Treaties in Force, 1904, 375, 376.

[5] Consular convention, 1902, art. 11, Treaties in Force, 1904, 399, 402.

[6] Convention relating to tenure and disposition of real and personal property, 1901, art. 3, Treaties in Force, 1904, 406, 407.

[7] Consular convention, 1878, art. 16, Treaties in Force, 1904, 457, 461.

[8] Consular convention, 1878, art. 15, Treaties in Force, 1904, 579, 583.

[9] Consular convention, 1881, art. 15, Treaties in Force, 1904, 652, 656.

[10] Consular convention, 1881, art. 11, Treaties in Force, 1904, 694, 697.

[11] Treaty of friendship and general relations, 1902, art. 26, Treaties in Force, 1904, 732, 740.

In the treaty with Germany the language of the entire section is identical except that in place of the words "consul or consular agents" the German treaty reads "nearest consular officer." The Netherlands convention is worded as is the German treaty, except that the local authorities are obliged to report to the nearest consular officer not only those cases in which the deceased national has no known heirs or testamentary executors by him appointed, but also "in case of minority of the heirs, there being no guardian."

It will be noted that the consular right under such a provision as that in the Austro-Hungarian convention appears to be only the right to be notified by the local authority of the death of his national, and his duty to be merely that of forwarding information to those of his nationals who are concerned.

The treaties with Belgium, Germany, Great Britain, Guatemala, Netherlands, Roumania, Servia, and Spain add to the rights conferred by the provision that appears in the Austro-Hungarian convention the following clause: "Consuls general, consuls, vice consuls, and consular agents shall have the right to appear, personally or by delegate, in all proceedings in behalf of the absent or minor heirs, or creditors until they are duly represented." This, doubtless, would be interpreted to give not only to the consul but to his agent or delegate a limited power of administration should such become necessary in the course of the exercise of the authorized powers. In the German treaty the words "consuls-general, consuls, vice-consuls, and consular agents" of the Belgian treaty (with which latter treaty agrees the language of the conventions with Roumania and Servia) are changed to the "said consular officer," with which latter agrees the language of the treaties with Great Britain, Guatemala, and the Netherlands. The treaty with Colombia[12] goes a step farther in one particular and is more restrictive in another: First, it provides that "They [consuls] may take possession, make inventories, appoint appraisers to estimate the value of articles and proceed to the sale of the moveable property of individuals of their nation;" but, secondly, they may do this only where there is no testamentary executor "or heirs at law" (the qualifying word *known* of the other convention is here omitted).

*Secondly.* — Other conventions provide that the consular jurisdiction shall attach only in those cases in which the consul's national dies intestate. In this class may be placed the conventions with Costa Rica,[13] Morocco,[14] and Paraguay.[15] Still further conventions confer upon the consuls jurisdiction over the estates of deceased persons in all cases whatsoever. Of such are the Persian [16] and Tripolitan.[17]

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[12] Consular convention, 1850, art. 3, par. 10, Treaties in Force, 1904, 206, 208.

The consular jurisdiction in countries allowing consular administration where no will exists is various. The treaty with the Argentine Republic [18] provides that "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-general or Consul of the nation to which the deceased belonged, or the representative of such Consul-general or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Our courts have interpreted this to mean that under it consuls in preference to local public administrators may be appointed administrators of the estates of deceased nationals.[19]

The treaties with Costa Rica, Honduras,[20] and Paraguay provide that the proper consular officer or, in his absence, his representative may nominate curators, to "take charge of the property of the deceased, so far as the laws of the country will permit, for the benefit of the lawful heirs and creditors of the deceased, giving proper notice of such nomination to the authorities of the country." [21] The treaty with Paraguay permits, further, that the proper consular officer or his agent shall take charge personally of the property "for the benefit of the lawful heirs and the creditors, until an executor or administrator be named" by the appropriate consular officer.

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[13] Treaty of friendship, commerce, and navigation, 1851, art. 8, par. 2, Treaties in Force, 1904, 215, 218.

[14] Treaty of peace and friendship, 1836, art. 22, Treaties in Force, 1904, 553, 557.

[15] Treaty of friendship, commerce, and navigation, art. 10, par. 2, Treaties in Force, 1904, 617, 620.

[16] Treaty of friendship and commerce, 1856, art. 6, Treaties in Force, 1904, 622, 624.

[17] Treaty of peace and amity, 1805, art. 20, Treaties in Force, 1904, 784, 788; of a similar import were the provisions of the Tunisian treaty of amity, commerce, and navigation, 1797, art. 19, Treaties in Force, 1904, 790, 793, which was abrogated by the treaty between the United States and France, 1904. [Treaties in Force, 1904, 949.]

[18] Treaty of friendship, commerce, and navigation, 1853, art. 9, Treaties in Force, 1904, 24, 27.

[19] See case of Wyman, Petitioner, 191 Mass. 276; In re Fattosini, 32 Miscellaneous (N. Y.) 18.

[20] Treaty of friendship, commerce, and navigation, 1864, art. 8, Treaties in Force, 1904, 439, 442.

[21] Treaty with Costa Rica, *supra*.

As has been already indicated above, the consular officer or his representative may not in all cases act by himself, but is obliged under certain treaties to associate with him other disinterested persons. The treaty with Colombia contains the following stipulation:

> In all such proceedings, the Consul shall act in conjunction with two merchants, chosen by himself, for drawing up the said papers or delivering the property or the produce of its sales, observing the laws of his country and the orders which he may receive from his own Government; but Consuls shall not discharge these functions in those states whose peculiar legislation may not allow it. Whensoever there is no Consul in the place where death occurs, the local authorities shall take all the precautions in their power to secure the property of the deceased.

Again, as has already appeared, the treaties in some cases provide that the consul may appoint an agent to perform his various administrative functions upon the estates of deceased nationals. This is the effect of the treaty with Paraguay, which provides that "the Consul General, Consul or Vice Consul of the nation to which the deceased may belong, or, in his absence, the Representative of such Consul General, Consul or Vice Consul, shall, so far as the laws of each country will permit, take charge, etc." Of similar import are the treaties with Argentina, Belgium, Costa Rica, Germany, Great Britain, Guatemala, Honduras, Netherlands, Roumania, Servia, and Spain, the treaty with the latter granting to consuls the right of "appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate."

Not a few of our treaties provide that the consul shall, in winding up the estate, administer so far as may be the laws of his own country. The treaty with Colombia provides that "In all such proceedings, the consul shall act * * * observing the laws of his country and the orders which he may receive from his own government." The Persian treaty provides that the consul "may dispose of them [the effects of the deceased] in accordance with the laws of his country." The treaty with Spain permits consular officers, "so far as compatible with local laws, to perform all the duties prescribed by the laws of their country and the instructions and regulations of their own Government for the safeguarding of the property and the settlement of the estate of their deceased countrymen," until the heirs or legal representatives themselves appear.

Only the treaties with Morocco, Tripoli, and Tunis (now abrogated) have provided that the effects of deceased nationals should be taken in charge, will or no will, by other nationals, until the one entitled to the property should appear.

However, enough has perhaps been said to suggest that these various conventions will well repay a more detailed study.

## THE INTEGRITY OF NORWAY GUARANTEED

The famous little maxim, "In union there is strength," carries with it the necessary implication that "In disunion there is weakness," and from the earliest day to the present it is the practice of the strong to separate probable opponents in order to crush each in turn. The separation of Norway and Sweden caused no little head-shaking among political prophets, for it was feared that Sweden and Norway might either yield in turn to Russia or feel the heavy hand of Russia.

The policy of Europe has been to prevent by diplomatic and other methods Russia's entry into the innermost and western chamber. The Russian-Japanese war showed the determination of Japan not to permit by peaceable means the further inroad of Russia into that portion of Asia nearest Japan. Opposed in most ways, the Far East and the Extreme West are at one in their desire to prevent the Russian from putting to sea. After centuries of effort Russia finds itself in possession of the Black Sea, but is not permitted unrestricted access to the Ægean. And Europe shows as little desire to see Russia encroach upon the Baltic. Hence the recent treaty of November 2, 1907, by which Norway agrees not to cede any of its territory, and in exchange for this agreement the integrity of Norway is guaranteed whenever threatened.

The reason for this new convention lies in the fact that the separation of Norway from Sweden seriously affects the treaty of November 21, 1855, between the united kingdoms of Norway and Sweden, France, and Great Britain, guaranteeing the integrity of the Scandinavian Peninsula.

"Desiring to prevent every complication of a nature to disturb the European equilibrium" — that is to say, to prevent Russia from acquiring a foothold in Norway and Sweden, and thus to confine it to the East of the Baltic — His Majesty the King of Sweden and Norway bound himself neither to cede to Russia nor to exchange with it, nor to permit it to occupy any part of the territory belonging to the crowns of Sweden and Norway. And the King of Sweden and Norway bound himself in addition not to cede or to lease to Russia any right of pasturage, fishery, or any right whatsoever within the territories or upon the coasts of Sweden and Norway, and to resist any pretension of Russia to any such rights. And the King of Norway and Sweden further agreed to communicate immediately any proposition or demand relating to said rights to Great Britain and France, which countries thereupon bound themselves to furnish His Majesty the King of Sweden and Norway the requisite naval and military forces to resist such Russian pretension and aggression. (Articles I and II of the treaty of November 21, 1855, between the King of Norway and Sweden, on the one hand, and Great Britain and France, on the other. 45 British and Foreign State Papers, 33, 34.)

It will be observed that Russia was not a party to this agreement, and naturally so, because France and Great Britain were then at war with Russia.

The situation in 1907 is different. France, Great Britain, and Russia are at peace, and Germany since the Franco-Prussian war has become a great naval and military power. It is therefore natural that Russia should desire to prevent Norway from falling under the influence of Germany, just as Germany is interested in preventing the westward extension of Russia. Hence the great powers of Europe having an interest in preserving the status quo have agreed to guarantee the integrity of Norway. It will be noted that Sweden is not a party to the agreement, but hemmed in by Russia on the east and Norway on the west, and with Germany on the south, it is not likely that Sweden will endeavor to assert an interest in Norway. It is therefore highly improbable that the Baltic will become a Russian or a German lake, and although by the third paragraph of the new convention Norway reserves the right to make special agreements with Sweden and Denmark, for the preservation of its integrity, it seems likewise improbable, owing to the state of feeling between the three Scandinavian Kingdoms, that any steps will be taken in the near future to bring them into anything approaching the mediæval union of Calmar.

The treaty of 1855 forbade a lease of territory; the convention of 1907 does not mention this possibility, and while the treaty of 1855 provided that Russian aggression should be resisted by sufficient naval and military forces, the integrity of Norway is to be maintained when threatened by such means as may be considered most suitable. The letter of the two treaties differs; the spirit is the same — namely, to prevent the western extension of Russia. This is no doubt as apparent to Russia as to the rest of the world. But the old saying that "politics makes strange bed-fellows" is still true in 1907.

The treaty as a whole guarantees the integrity of Norway; it does not guarantee its neutrality. This question, it is understood, is left for further consideration.[1]

## EDWARD HENRY STROBEL

In the first number of this JOURNAL the editorial column noticed the death of Carlos Calvo, the distinguished theorist and writer on international law. The first number of the second year has the painful duty of recording the death of Edward Henry Strobel, general adviser to the King of Siam, first Bemis professor of international law at Harvard, and approved and trusted practitioner of international law. Born in Charleston, S. C., December 7, 1855, he died at Bangkok, Siam, on the 16th day of January, 1908. Young in years — for he was barely fifty-two — he was rich in practical experience. He graduated from Harvard in 1877, the law school in 1882, and practiced law in New York 1883 to 1885. With this latter date his strictly professional career in our municipal courts may be said to have ended, for in 1885 he was appointed secretary of the American legation at Madrid, where he served until 1890, about one-third of which time as chargé d'affaires. During his residence at Madrid he was detailed on special business to Morocco on two occasions (1888 and 1891).

From 1893 to 1894 he served as Third Assistant Secretary of State, resigning to accept the ministry to Ecuador, and in December of the same year he was transferred as minister to Chile, serving until the termination of Mr. Cleveland's second administration in 1897. His tact and experience restored the strained relations between Chile and the United States, and the respect in which he was held by the Government to which he was accredited is shown by the fact that in 1899 he was appointed counsel for Chile before the United States and Chilean Claims Commission at Washington.

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[1] The text of the declaration of abrogation of the treaty of 1855, and of the treaty of November 2, 1907, will be published in a subsequent Supplement of the JOURNAL.

Upon the establishment of the Bemis professorship of international law he was selected in 1898 as the first incumbent of the chair, and his services were so highly regarded by the university authorities that he was given a leave of absence in 1903 in order to enable him to accept the position of general adviser to the Government of Siam, for which position he was recommended by the late Secretary of State John Hay. The original appointment to Siam was for a period of two years, and upon its expiration he accepted a further appointment for the period of six years.

His services as general adviser to Siam were not only of importance to the country he had the honor to serve, but of an equal value to the chief European nation with which Siam came into contact. The treaty of delimitation between France and Siam, signed on the 23d day of March, 1907 (for the text of which see Supplement I:263, 267), put an end to controversies extending over years, which, if unsettled, were likely to embroil the contending countries for years to come. The settlement, dictated by a spirit of equity, was equally honorable and satisfactory to France and Siam, and Mr. Strobel performed no mean service to international peace and harmony by the successful negotiation of the treaty.

The spirit of the man was shown by his simple words on resigning the professorship at Harvard in 1906: "Yes, I am going back to Siam. I love the people, and I feel I can do more good there." His loss is a loss to two peoples, a noble epitaph worthy of a noble career.

# CHRONICLE OF INTERNATIONAL EVENTS

## WITH REFERENCES

Abbreviations: *Ann. Sc. Pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; Staatsb., *Staatsblad*, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

*April, 1907.*

11 SERVIA—SWEDEN. Declaration signed at Belgrade. Mutual most-favored-nation treatment in commerce, industry, and customs. Does not apply to special favors accorded by Sweden to Norway, or to concessions accorded by either to adjacent states to facilitate frontier trade or to concessions resulting from the conclusion of a customs union. Terminable by denouncement. Servian law, December 28, 1907, O. S. *Srpske novine* (Belgrade) December 29, O. S.

16 BOLIVIA—CHILE. Protocol signed at Santiago. Designates permanent court of The Hague to arbitrate under Art. XII of treaty of peace signed at Santiago October 20, 1904 (*For. rel.,* 1905), instead of the German Emperor, who declined. *Memoria.... rel. ext., 1907,* La Paz.

24 BELGIUM—SERVIA. Treaty of commerce signed at Belgrade. *Srpske novine* (Belgrade) December 29, O. S. Replaces the provisional commercial arrangement signed July 10, 1895. The most-favored-nation clause does not apply to concessions accorded a third state by virtue of a customs union, nor to collection of additional duties on goods receiving bounties for export or production.

*May, 1907.*

1 Bolivia—Chile. Protocol signed respecting exchange of territory in regions of Chacmuco and Collaguasi. *Mem....rel. ext.,* La Paz, 1907. Brought about by objections of inhabitants of former region to transfer to Chile under treaty of October 20, 1904.

6 Bolivia—Chile. Chilean promulgation of protocol signed at Santiago, November 15, 1904, supplementary to treaty signed at Santiago, October 20, 1904. *For. rel.,* 1905; *B. A. R.,* September, 1907. Bolivia recognizes absolute sovereignty of Chile over territories lying between the twenty-third and twenty-fourth parallels south latitude.

11 United States. Instrument of adherence deposited with the government of Belgium to the convention signed at Brussels November 3, 1906, revising the duties imposed by the Brussels convention of June 8, 1899 (*Stat. at L.* 31:1915; *Compilation of treaties in force,* Washington, 1904), on spirituous liquors imported into certain regions of Africa. Adherence advised by the Senate, February 15, 1907; declaration of adherence by the President, February 19, 1907; proclaimed December 2, 1907. Signatory powers: Germany, Belgium, Spain, Kongo, France, Great Britain, Italy, Netherlands, Portugal, Russia and Sweden. Austria-Hungary, Denmark, Norway and Persia have adhered. *Actes de la conférence pour la révision du régime des spiritueux en Afrique, 1906,* Brussels, 1906. *See November 3, 1907.*

18 Argentine—Bolivia. Protocol signed respecting extension of Central Northern R. R. of Argentina to Tupiza. *Memoria.... rel. ext.,* La Paz, 1907. Grading on the line from Tupiza to Potosi can be begun when the Quiaca-Tupiza section is half completed. For text of treaty signed at Buenos Aires February 16, 1906, see *Memoria....rel. ext., 1906,* La Paz, 1907, which was for the purpose of rendering effective the treaty signed at Buenos Aires June 30, 1894 (*Tratados....la républica Argentina,* Buenos Aires 1901, 1:394), and the complementary agreement of September 29, 1903.

26 France—Bulgaria. Arrangement on the subject of interpretation of the provisions of the treaty of commerce signed January 13, 1906, *q. v.* *Arch. dipl.,* 102:335.

*June, 1907.*

5 Colombia—Ecuador. Convention signed at Bogotá, supplementary to the treaty signed at Bogotá, November 5, 1904 (*For. rel.,* 1905). Creates an arbitration tribunal and a technical commission for the purpose of determining and delimiting the boundary between the two countries. *B. A. R.,* October, 1907; *Diario oficial* (Bogotá), July 6, 1907.

15 Dominican Republic. Decree ratifying treaty signed at Rio de Janeiro August 23, 1906, for the creation of an international commission of jurists. Approved by Dominican Congress June 14, 1907. *Ga. oficial,* October 12.

15 Dominican Republic. Decree ratifying convention signed at Mexico January 27, 1902, for protection of literary and artistic property. Approved by national congress April 24, 1907. *Ga. oficial,* October 5.

25 Guatemala—Honduras. Decree of Honduras extending boundary convention of March, 1895, for one year from March 1, 1907. *La Gaceta,* July 13, 1907.

25 France—Kongo—Portugal. Agreement by exchange of notes modifying article 2 of the protocol of April 8, 1892, increasing export duty on caoutchouc from four to six francs a kilogram. *Arch. dipl.,* 104:1.

*July, 1907.*

15 Netherlands. Laws approving three conventions signed at The Hague July 15, 1905, relative to (1) civil procedure, (2) marriage, (3) lunatics. *Lagemans: Recueil des traités et conventions conclus par le royaume des Pays-Bas,* 16:9, 19, 24. These conventions were results of the fourth conference on private international law. The latter two were signed by Germany, France, Italy, Netherlands, Portugal, Roumania, and Sweden; the first one by the same powers together with Spain, Luxemburg, and Russia. *Staatsb.,* 1907, Nos. 197, 198, 199. On the 1904 conference see *Actes de la quatrième conférence de la Haye pour le droit international privé,* The Hague, 1904; and *Official report of the universal congress of lawyers and jurists....1904,* St. Louis, 1905, in which are papers by Professors *Jitta* and *Meili* on *A review of the four Hague conferences on private international law, the objects of the conferences, and their probable results,*

*July, 1907.*

accompanied by discussion with bibliography, p. 375, by Judge Simeon E. Baldwin; also *Baldwin: The Hague conference of 1904 for the advancement of private international law, Yale law J.*, 14:1.

23 FRANCE—ROUMANIA. Ratifications exchanged at Paris of convention of commerce and navigation signed at Paris, March 6, 1907. *J. O.*, July 14, August 1; *J. du dr. int. privé*, 34:1235.

29 ITALY—SAN MARINO. Ratifications exchanged at Rome of convention signed at Rome June 14, 1907, additional to the convention of friendship and good neighborhood (*State Papers*, 90:960; *Trattati e conv. fra il regno d'Italia ed i governi esteri*, 15:326), signed at Florence June 28, 1897. The new provisions, more suited to the close economic relations of the states, are based on the Hague conventions on international law of November 14, 1896, July 17, 1905, and June 12, 1902. *R. di dr. int.* 2:392. The 1897 treaty thus modified with the additional convention signed February 16, 1906, *q. v.*, runs for ten years and until denouncement, from July 29, 1907.

31 COLOMBIA—ECUADOR. Ratifications exchanged at Quito of treaty signed at Quito June 18, 1903. Proclaimed in Ecuador July 31, 1907. Private international law. Text, *B. del ministerio de rel. ext.* (Quito), 1:281; also in *B. del ministerio rel. ext.* (Bogotá), 1:143.

*August, 1907.*

3 COLOMBIA—ECUADOR. Protocol signed at Quito. To constitute a tribunal of two to fix amount of indemnity for Colombian citizen Campuzano under arbitral decision rendered October 2, 1897. *B. del ministerio de rel. ext.* (Bogotá), 1:49.

7 LUXEMBURG. Grand ducal order. Ratification of the postal conventions and arrangements concluded at Rome May 26, 1906. *Mémorial du Grand-Duche de Luxemburg*, 1907, No. 49 and Annexe.

18 GUATEMALA—SALVADOR. Ratifications exchanged at San Salvador of general Central American treaty signed at San José September 25, 1906. *Diario oficial*, August 29, 30, 31.

19 SEVENTH INTERNATIONAL ZOOLOGICAL CONGRESS, at Boston. Adjourned August 23.

*August, 1907.*

23 COLOMBIA—ITALY. Protocol signed at Bogotá. Indemnification $10,000 for injuries to Italians at Cartagena December 28, 1906. *B. del ministerio de rel. ext.* (Bogotá), 1:43.

24 GREAT BRITAIN—NICARAGUA. Expiration of period for notification of accessions of British colonies to treaty of commerce and friendship signed at Managua, July 28, 1905. The British colonies which have acceded to the treaty under article XX: British Honduras, Gambia, Hong Kong, Jamaica (with the Turks and Caicos Islands and the Cayman Islands), Leeward Islands, New Zealand, Northern Nigeria, Seychelles, Sierra Leone, Southern Nigeria, Straits Settlements, Windward Islands. *Treaty ser.,* 1907, No. 43.

26 ELEVENTH INTERNATIONAL CONGRESS OF THE INSTITUTE OF STATISTICS opened at Copenhagen. *Zimmermann-Braunschweig: Die XI Tagung des internationalen statistischen instituts zu Copenhagen, 1907, Zeitschrift für die gesamte staatswissenschaft,* 63:772; for prior sessions, *id.* 58:98 and 60:531. Adjourned August 31. Established in 1885 at London.

27 GREAT BRITAIN—SALVADOR. Postal money order convention signed at San Salvador; signed at London June 27, 1907. Decree of Salvador approving, September 5, takes effect same day. *Diario oficial,* October 28, 1907; *B. A. R.,* December.

29 ECUADOR—FRANCE. Ratifications exchanged at Quito of protocol signed at Quito July 1, 1905, additional to convention signed May 9, 1898. Literary and artistic property. *J. O.,* November 24, 1907. French decree promulgating November 20, 1907. Ratified by Ecuador, October 23, 1905. *Registro oficial,* February 21, 1906; *Droit d'auteur,* 20:149. The 1898 convention which entered into force November 6, 1898, did not contain a most-favored-nation clause, as did the convention signed June 30, 1900, in force January 15, 1905. The present protocol "with the aim of fixing the meaning" of the 1898 convention grants authors the most-favored-nation treatment. *Dr. d'auteur,* 18:42; 19:79.

29 FRANCE—GREAT BRITAIN. Exchange of notes. Arrangements under article X, § 4, of convention signed at London October 20, 1906 (*Treaty ser.,* 1907, No. 3) respecting the New Hebrides. *Treaty ser.,* 1908, No. 3.

*September, 1907.*

3 FRANCE—GERMANY. French decree promulgating convention signed at Paris, April 8, 1907, respecting protection of literary and artistic property. *Dr. d'auteur,* August and October, 1907; *J. du dr. int. privé,* 34:1221; *J. O.,* September 5, 1907. *See April 8 and July 31, 1907.* The relations between France and Germany before the promulgation of this treaty were ruled (1) by the convention of 1883, (2) by the convention of Berne of 1886, and the additional act of 1896, and (3) by the exchange of notes of 1903 confirming to the French the benefits of the most-favored-nation clause. *See also July 12 and 31, 1907. Les effets du traité littéraire et artistique franco-allemand, Bibliographie de la France,* November 22, 1907.

4–6 GREAT BRITAIN—UNITED STATES. Agreement effected by exchange of notes at London. *Cd.,* 3734, 3765. *Times,* September 17, 26, 30, October 16 1907. *Treaty ser.,* 1907, No. 35; *Nation,* November 21. Modus vivendi in regard to inshore fisheries on the treaty coast of Newfoundland. Documents, *ante,* 1:375.

5 ANNAM. Duy Tan recognized by governor-general, M. Beau, in name of France as king of Annam. For description of ceremonies, *R. dipl.,* October 20; *Min. dipl.,* October 6. *See July 29, 1907.*

7 INTERNATIONAL CONGRESS ON DERMATOLOGY. Sixth meeting at New York. Adjourned September 14. Proceedings in *El Guatemalteco* (Guatemala), December 2 to 6.

7 JAPAN—RUSSIA. Treaty of commerce and navigation, and fisheries convention ratified. *Receuil de documents diplomatiques concernant les négociations en vue de la conclusion d'une convention de pêche entre la Russie et le Japon. Août 1906-Juillet 1907.* St. Petersburg, 1907.

7 CANADA. Attack on Japanese in Vancouver. *Mem. dipl.,* 45:580; *Stead: Racial prejudice against Japan, Fortnightly R.,* 82:637; *Canada and Japan, North China Herald,* 85:573; *The riots in Vancouver, North China Herald,* 85:604; *The Asiatic question in British Columbia, Times,* September 21; *Aubert: Les Japonaise, le Canada et l'Amérique du Sud, La R. de Paris,* 1907, 6:195; *Canada and Japanese immigrants, Times,* September 23, October 24. Respecting Japanese immigration into the United States, see *March 14, 1907.* Additional references: *Lewis: Can*

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*the United States by treaty confer on Japanese residents in California the right to attend the public schools, American Law Register,* 55:73; *Japanese immigration—an exposition of its real status,* Seattle, 1907; *Viallate: Américains, Japonais et Californiens, R. bleue,* April 16, 1907; *Tardieu: Le Japon et les Etats-Unis, R. des deux mondes,* 43:326; *Japan and Canada, Spectator,* January 25, 1908.

7 GREAT BRITAIN. Royal commission issued to five commissioners "to enquire into the relations now existing for financial and administrative purposes between the Supreme Government and the various Provincial Governments in India, and between the Provincial Governments and the authorities subordinate to them, and to report whether, by measures of decentralization or otherwise, those relations can be simplified and improved, and the system of Government better adapted both to meet the requirements and promote the welfare of the different provinces, and, without impairing its strength and unity, to bring the executive power into closer touch with local conditions." *London Ga.,* September 10; *Cd.,* 3710; *Pirion: L'Inde contemporaine et le mouvement national,* Paris; *Zumbro: India—A nation in the making, R. of R.,* 36:432; *Times,* September 13, October 22; *Skrine: India's Awakening, No. Am. R.,* 185:711; *The Riots in Calcutta, Spectator,* October 14; *Signs of the times in India, Edinburgh R.,* 206:265; *Imp. and Asiatic Quart. R.,* 24:428; *National R.,* 50:493; *Ameer Ali: Some racial characteristics of northern India and Bengal, Nineteenth Century,* 62:699; *Ilbert: The government of India* (2d edition, Clarendon Press, 1907); *Fuller: The claims of sentiment upon Indian policy, Nineteenth Century,* 62:987; *The strong hand in India, North China Herald,* 85:330; *Karkaria: Thoughts on the present unrest in India, Calcutta R.,* 124:463; *Future problems in Bengal, Times,* September 24.

8 THIRD INTERNATIONAL PETROLEUM CONGRESS, at Bucharest. Next congress at Lemberg in 1910. *R. dipl.,* September 22.

8 FOURTEENTH INTERNATIONAL CONGRESS OF FREE THINKERS opened at Prague. Proceedings, *Mem. dipl.,* September 15. Next Congress at Brussels, 1911. Organized at Brussels in 1880.

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9 International League of Peace. Sixteenth congress opened at Munich. *Times,* September 12; *Mem. dipl.,* September 15. Adjourned September 14. Next Congress at Stockholm in 1909. Proceedings and resolutions in *Advocate of Peace,* October.

9 Great Britain. Proclamation ordaining that on and after September 26, 1907, the title of the Colony of New Zealand be the Dominion of New Zealand. *London Ga.,* September 10, 1907.

12 Second International Congress on Gouttes de Lait, opened at Brussels; first Congress in Paris, 1905. *Mem. dipl.,* September 15.

13 International Federation of Aeronauts. Conference opened at Brussels. Next Conference at London, 1908. *Times,* September 14. Organized at Berlin, October 15, 1906.

16 Bolivia—Brazil. Brazilian decree approving protocol signed at Rio de Janeiro containing instructions concerning the reconnaissance of the river Verde and its headwaters. February 5, 1907, there were signed at Rio de Janeiro protocols for verification of the Rio Verde and respecting arbitral tribunal provided by the treaty signed at Petropolis, November 17, 1903 (*For. rel.,* 1904), to adjudicate claims arising from administrative acts and events in the territories exchanged, tribunal to begin work within one year of date of protocol. *Mem. . . . rel. ext.,* 1907 (La Paz).

16 Brazil. Decree approving universal postal convention signed at Rome, May 26, 1906.

16 International Miners' Congress, at Salzburg. The next congress will meet at Paris in 1908. *Times,* September 17–21.

17 Third International Dairy Congress opens at Scheveningen. The second congress was held at Paris, 1905. *Cd.,* 3689.

17 Costa Rica—Guatemala—Honduras—Nicaragua—Salvador. Protocol signed at Washington, arranging for a conference for the purpose of agreeing upon a general treaty of arbitration and friendship. Text: *Boletín oficial de la secretaría de las relaciones exteriores* (Mexico), October, 1907, and *B. A. R.,* October and December. *See November 14, 1907.*

17 Belgium—Great Britain. Convention signed at London; ratifications exchanged at London, October 5, 1907; in force October 15, 1907. Postal money orders. *Monit.,* October 11; *Treaty ser.,* 1907, No. 36; *B. Usuel,* September 17.

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18 ARGENTINE REPUBLIC—ITALY. General treaty of arbitration signed at The Hague. *Times,* September 19. The parties will submit to arbitration all disputes that cannot be settled by diplomatic means, except those touching constitutional arrangements in force in differences for settlement of which the judiciary is competent. The right to submit a dispute to arbitration arises only after the national jurisdiction shall have pronounced definitely on the subject. Shall be submitted: differences concerning the interpretation or application of conventions, or of a principle of international law. Whether a dispute is such a difference will be submitted to arbitration. Disputes regarding the nationality of an individual are expressly withdrawn. In each case a special compromis will be signed determining the constitution and procedure of the tribunal and the object of the suit; otherwise the arrangements established by The Hague convention of 1899 shall rule.

18 FRANCE—LIBERIA. Arrangement signed at Paris, to fix definitively the limits of French West Africa. Provisional sketch of new boundary in *Geographical J.,* 31:105. The Franco-Liberian Delimitation Commission begins work this dry season.

19 BELGIUM—NETHERLANDS. Postal convention signed at The Hague. Ratifications exchanged at The Hague September 27, 1907. *Monit.,* September 29, 1907. Supersedes convention signed June 23, 1892, and the supplementary convention signed November 25, 1898. *B. Usuel,* September 19; *Staatsb.,* 1907, No. 259. Takes effect October 1, 1907.

19 CANADA—FRANCE. Treaty of commerce signed at Paris; superseding treaty signed February 6, 1893. *Times,* September 20; *Q. dipl.,* 24:470; text, *Cd.,* 3823. In force for ten years from exchange of ratifications and until one year from denouncement. Applies to "France, Algeria, the French colonies and possessions, and the territories of the protectorate of Indo-China," and may subsequently, by agreement, be extended to Tunis. Natural and manufactured products of Canadian origin (schedule A) shall enjoy French minimum tariffs and the lowest customs rates applicable now or in future to like products of other countries. Schedule B of articles of French and French colonial produce are allowed the Canadian intermediate tariff and the lowest duties

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applicable, now or hereafter, to like products of other foreign countries. Schedule C sets forth a special tariff for certain French products, among which are wines, champagnes, books, medicinal preparations, embroideries and silk manufactures. The enjoyment of these advantages is conditional upon the direct conveyance of the goods without transshipment from French to Canadian ports and vice versa. Certificates of origin may be demanded. Most favored nation treatment in everything relating to pursuit of trade and industry. Neither party shall impose upon the products of the other a higher excise or internal duty than is charged upon native products. Also similar treatment in the protection of patents, trademarks, etc. *Times,* November 29, December 2; *Q. dipl.,* 24:856.

20 CHINA. Decree of Empress Dowager acknowledging that a constitution is necessary, and declaring that as the two houses of parliament cannot at once be inaugurated, it will be necessary first to establish an Assembly of Ministers to confer on State matters and to prepare the foundations of constitutional government. Prince P'u Lun and the Grand Secretary Sun Chia-nai are appointed to preside over the said Assembly and they are commanded to confer with the Grand Council on details and modes of procedure. Having settled upon these, details are to be presented to the Throne for imperial sanction. *North China Herald,* 85:734.

20 AUSTRIA—UNITED STATES. Proclamation of the President of the United States that the first of the conditions specified in section 13 of the act of March 3, 1891 (*Stat. at L.,* 26:1106), is fulfilled in respect to the subjects of Austria. The said copyright act therefore applies to subjects of Austria. The condition referred to is that a foreign state shall permit citizens of the United States the benefit of copyright on substantially the same basis as its own citizens. *Stat. at L.,* vol. 35. February 26, 1907, Austria passed a law extending to the works of foreign authors in the absence of treaties, under condition of reciprocity, the provisions of the law of December 26, 1895. *Dr. d'auteur,* February, March, April, and June, 1907. Order of Austrian minister of justice, dated December 9, 1907, took effect December 14, 1907. See *Dr. d'auteur,* January, 1908, on legal effect of the difference in dates of the two proclamations.

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21 INTERNATIONAL EARTHQUAKE CONFERENCE at The Hague. Adjourned September 25. The first conference held since the complete organization of the International Seismological Association. The first conference of this kind, held at Strasburg in 1901, led to the decision to work for the establishment of an association of states to be officially represented at future conferences. A first meeting of such official representatives was held at Strasburg in 1903, and led to the organization of the association on definite lines by the acceptance of a series of regulations, a full reprint of which is in *Petermann's Mitteilungen* for 1903, p. 201. The central bureau has since been inaugurated at Strasburg. *Geographical J.,* 28:81.

21 BELGIUM—LUXEMBURG. Act signed at Luxemburg additional to the postal convention signed March 6, 1879. *Monit.,* September 29; *B. Usuel,* September 21.

22 ELEVENTH INTERNATIONAL PRESS CONGRESS opened at Bordeaux. Adjourned September 24. Proceedings, *Mem. dipl.,* September 29. Next Congress at London, 1909.

23 DENMARK—NORWAY—SWEDEN. Convention of delegates at Copenhagen, ten from each of the interparliamentary groups of the three Scandinavian parliaments. Purpose, to effect a Scandinavian interparliamentary union. *Mem. dipl.,* October 6.

23 FOURTEENTH INTERNATIONAL CONGRESS OF HYGIENE AND DEMOGRAPHY opened at Berlin. *Mem. dipl.,* 45:611. Adjourned September 29. *Times,* September 24. Report of Cuban delegate is an appendix to *B. oficial del departemento de estado,* December.

23 GREAT BRITAIN—RUSSIA. Ratifications exchanged at St. Petersburg of treaty signed at St. Petersburg, August 31, 1907, respecting Persia, Afghanistan and Thibet. See *August 31, 1907. Vambery: The Anglo-Russian Convention, Nineteenth Century,* 62:895; *Fraser: The position in the Persian Gulf, National R.,* 50:624; *de Noirmont: La convention anglo-russe, Q. dipl.,* 24:596; *Rouire: La fin d'une rivalté seculaire—La dernière convention anglo-russe, R. des deux mondes,* 48:107; *Yate: The Anglo-Russian convention, Imp. Asiatic Quart. R.,* 25:1; *Views on the Anglo-Russian agreement, Fortnightly R.,* 82:725; *Spectator,* October 26; *The Anglo-Russian convention, North China Herald,* 85:329, 355; text, *Cd.,* 3760; *R. di dr. int.,* 2:401; *Sykes:*

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*A travers la Perse orientale,* Paris, 1907; *Nuova Antologia,* October 16, p. 709; *The confusion in Persia, Spectator,* December 28; *Browne: The Persian view of the Anglo-Russian agreement,* Albany R., 2:287; *Times,* September 24, 25, 26, 28; *Chirol: The middle Eastern question,* London, 1903; *Whigham: The Persian problem,* London, 1903; *L. de St. Victor de St. Blancard: L'accord anglo-russe du 31 août 1907, Am. Sc. Pol.,* 23:36. For Persia's note of November 2 to British legation respecting this treaty, see *Times,* November 25.

24 FRANCE—SALVADOR. French decree promulgating convention signed August 24, 1903, at San Salvador respecting reciprocal protection of industrial property. Ratifications exchanged at San Salvador, June 8, 1907. Text, *J. O.,* October 1, 1907.

25 INTERNATIONAL MARITIME CONFERENCE opened at Venice. Adjourned September 28. *Times,* October 5.

25 NETHERLANDS—PERU. Convention signed at Lima, admitting Peruvian consuls in Dutch colonies. This is a right which Netherlands recognizes only by special treaties.

26 KOREA. Imperial rescript charging Koreans to disarm and return home. *North China Herald,* 85:32. *The Korean mutiny—Japanese official report, North China Herald,* 84:388.

28 BADEN. Death of Grand-duke Friedrich I at Mainau. Born September 9, 1826; second son of Grand-duke Leopold and of Grand-duchess Sophie, Princess of Sweden; regent April 24, 1852; took title of Grand-duke September 5, 1856; married September 20, 1856, Grand-duchess Luise, daughter of Wilhelm I, Emperor of Germany. Succeeded by his son as Friedrich II; born July 9, 1857; married September 20, 1885, Hilda, daughter of the Grand-duke of Luxemburg, Duke of Nassau. The ruler of Baden took the title of Elector in 1803, and of Grand-duke in 1806. Baden was a member of the Confederation of the Rhine, and, from 1815 to 1866, of the German Confederation. *Times,* September 30, 1907.

28 CHILE—COLOMBIA. Protocal signed at Bogotá modifying convention signed at Bogotá October 17, 1902, respecting form of payment of value of steamer Lantaro. Colombia pays £20,000 instead of £37,000. *B. del ministerio de rel. ext.* (Bogotá), 1:44.

30 CHINA. Two decrees respecting constitutional government. *North China Herald,* 85:24.

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1 CHINA. Decree for the protection of missionaries. Enunciates equal rights of all men and introduces principle of general toleration. *North China Herald,* 85:24; *Missionaries and the imperial decree, id.,* 85:49.

1 BOLIVIA—CHILE. Chile's denouncement of postal agreement of July 12, 1897, takes effect. *Mem.....rel. ext.,* La Paz, 1907.

1 UNIVERSAL POSTAL CONVENTION signed at Rome May 26, 1906, *q. v.,* takes effect. *Ga. de Madrid,* November 10 and 11; *J. O.,* October 3; *Lagemans: Recueil des traités,* 16:92; *Staatsb.,* 1907, No. 239; *Diario oficial* (Salvador), October 24, 25; *Cd.,* 3556, 3558; *B. de statistique et de législation comparée,* 31:546. The Chinese imperial postoffice has published a tariff of postage, which came into force October 1, 1907, and which provides for the relations with the countries of the postal union the reduced rates fixed by the Rome convention. In the relations with Japan, Hongkong, Macao and Tsingtau rather lower rates have as a rule been fixed. *L'union postale,* 33:15.

1 TURKEY. Communication of Austria-Hungary and Russia to Bulgaria, Greece and Servia concerning affairs of Macedonia. For text *Ann. dipl. et cons.,* 6:103, and *Q. dipl.,* 24:546. Text of Greek reply *Ann. dipl. et cons.,* 6:130; *Macedonia, The Nation,* 85:557; *Times,* October 1, 2, 3; *Henry: Macedoine et Balkan, Q. dipl.,* 24:809; *Ann. dipl. et cons.,* 6:148; *Arch. dipl.,* 104:118; *Mem. dipl.,* October 27, November 10; *Focief: La justice turque et les reformes en Macedoine,* Paris, 1907; *Kasasis: Grecs et Bulgares aux dix-neuvième et vingtième siècles,* Paris, 1907; *R. dipl.,* December 15.

5 ECUADOR. Opening session at Quito of arbitration tribunal that is to settle differences between Government of Ecuador and the Guayaquil and Quito Railway. *B. A. R.,* November.

5 GREAT BRITAIN—SWEDEN. Agreement by exchange of notes at London respecting the estates of deceased seamen. *Treaty ser.,* 1907, No. 37.

7 PERSIA. Shah approves at Teheran fundamental principles elaborated by parliament, additional to constitution granted by Muzaffer-ed-din. Text, *Mem. dipl.,* November 17, 24, and December 1.

7 INTERNATIONAL COTTON TRADE CONVENTION opened at Atlanta, Ga. Adjourned October 9. With exception of China, Japan and India,

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every cotton manufacturing country was represented by delegations of spinners. For recommendations adopted by the Convention, see *Times,* October 25.

7 CHINA—RUSSIA. Convention restoring to China all her former rights to telegraph lines in Russian Manchuria. *R. of R.,* November.

8 AUSTRIA—HUNGARY. Customs and commercial treaty signed at Budapest, with appendices—a veterinary convention, a railway and tariff agreement, and excise arrangements. Hungary consents to raise her share of the sum jointly contributed to the expenses of the common ministries of war, finance and foreign affairs, from 34.4 to 36 per cent, in consideration for being formally represented in all future commercial treaties with foreign states. Austria is to take steps for the liquidation or separation of the Joint State Bank, unless Hungary expresses a desire for its maintenance within the next six months. The protection of the rights in industrial property under the compromis is discussed in *Dr. d'auteur,* November. A court of arbitration for settlement of differences between the two States is to be created; Austria selecting four Hungarian, and Hungary four Austrian, judges, the presidency being decided by lot. Each government will be represented before the court by its own delegates. *Louis-Jaray: La question d'Autriche-Hongrie, Q. dipl.,* 23:465; *Times,* October 8, 9, 10, 18; *Il dissidio austro-ungerico* in *Gray: Questioni diplomatiche e sociali dell'anno 1905,* Torino, 1906; *Apponyi: The juridical nature of the relation between Austria and Hungary, Congress of arts and science.... St. Louis, 1904,* 1906, 7:529; *Spectator,* 99:51, 473. Takes effect January 1, 1908, and endures until December 31, 1917.

10 ARGENTINE REPUBLIC. Decree approving postal convention and annexed protocols signed at Rome, May 26, 1906. *B. A. R.,* December.

11 NICARAGUA. Accession to the declarations signed at The Hague, July 29, 1899, respecting (1) expanding bullets, (2) asphyxiating gases. *Treaty ser.,* 1907, No. 40. For table of prior accessions see *June 15, 1907,* vol. I, p. 1003.

11 SPAIN. Deposit at Berne of ratification of Geneva convention signed July 6, 1906.

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12 France—Servia. Ratifications exchanged at Belgrade of treaty of commerce and navigation signed at Belgrade January 5, 1907, *q. v. J. O.*, July 14, November 10. French decree promulgating, November 7, 1907.

15 International Conference of Maritime Employers' Federations opened at London. *Times*, October 17.

16 Belgium—Germany. Treaty signed respecting literary and artistic property. Identical with Franco-German treaty signed April 8, 1907, *q. v.*

16 Italy—Mexico. Treaty of general arbitration signed at The Hague. Term, ten years from exchange of ratifications. For commentary by G. Fusinato on recent treaties of general arbitration concluded by Italy, see *R. di dr. int.*, vol. II, No. 6.

16 Philippine Islands. First Philippine Assembly inaugurated. *Charlton: The Philippine assembly* in *Proceedings of the 25th annual meeting of the Lake Mohonk Conference of friends of the Indian and other dependent peoples, 1907*, p. 77; and other addresses on American relations with the Philippine Islands in the same volume and reports of previous meetings; *Times*, October 17; *Doherty: The Philippines Assembly, Independent*, 64:357; *Special report of Wm. H. Taft, Secretary of War, to the President on the Philippines*, Washington, 1908; *Munro: The introduction of representative government in the Philippine Islands, Zeitschrift für Volkerrecht und Bundesstaatsrecht*, vol. 2, No. 2.

18 Second International Peace Conference adjourned. See *June 15, 1907*. Documents, *post; Westlake: The Hague Conference, Quarterly R.*, 208:225; *Charteris: The second peace conference, Juridical R.*, 19:223; *Hague conference of the future, Spectator*, October 26; *Cd.*, 3857; *Davis: The second Hague conference, Independent*, 63:1094; *d'Estournelles de Constant: The results of the Second Hague Conference, id.*, November 21; *Lémonon: La seconde conférence de la paix, Q. dipl.*, 24:596; *Hazeltine: The second peace conference, N. A. R.*, 186:576; *Hill: Second peace conference at The Hague, Am. J. of int. law*, 1:671; *Ernst: La deuxième conférence de la paix, La R. Générale*, 43:636; *The second Hague conference, Edinburgh R.*, 207:224; *Elliott: The second Hague conference, South Atlantic Quarterly*, 7:42; *Stead: Impressions from The Hague, Contem-*

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*porary R.,* 92:721; *Barclay: Problems of international practice and diplomacy,* London, 1907; *Stead: Notes from The Hague, R. of Reviews* (London), 36:463; *Stead: Brazil at The Hague, R. of Reviews* (London), November, 1907; *Lémonon: La seconde conférence de la paix, R. politique et parlementaire,* 55:320; *von Schleinitz: Der seehandel, das Seekriegsrecht und die Haager Friedenskonferenz, Deutsche R.,* 32:129; *Hill: The net result at The Hague, R. of R.,* 36:727; *Reinsch: Failures and successes at the Second Hague conference, Am. pol. sci. R.,* 2:204; *R. di dr. int.,* 2:408; text of final act, dated October 16, and conventions in *R. de dr. int. et de législation comparée,* 9:599, *Cd.,* 3857, *Document, post,* and *R. di dr. int.,* vol. 2, No. 6; *Times,* October 24. For the results of the conference so far as the international law of war is concerned, see *Westlake: International law,* Part 2, pp. 267–331.

23 FRANCE—HAITI. Ratifications exchanged at Paris of commercial convention signed at Port au Prince January 30, 1907. French decree promulgating, October 30, 1907. *J. O.,* November 1; *Le Moniteur* (Port au Prince), February 20; *B. A. R.,* May; *Ann. dipl.,* 5:100; *B. int. des douanes,* No. 108, supplement 4; *J. O.,* March 31, July 31, August 3. Reciprocal tariff concessions.

23 FRANCE—GREAT BRITAIN. Agreement signed at Paris to facilitate accomplishment of formalities provided by article 6 of the convention of commerce and navigation signed February 28, 1882, respecting patterns or samples liable to duty. Decree of France promulgating, December 27. *J. O.,* December 28; *Treaty ser.,* 1907, No. 45.

23 FRANCE—GREAT BRITAIN. Ratifications exchanged at Paris of agreement signed at Paris June 30, 1906, supplementary to money order convention of September 21, 1887. *Treaty ser.,* 1907, No. 41; *J. O.,* November 27, 1907; French decree promulgating, November 2, 1907.

23 FRANCE—GREAT BRITAIN. Ratifications exchanged at Paris of convention signed at Paris June 30, 1906, for exchange of money orders between the United Kingdom and various French colonies. *Treaty ser.,* 1907, No. 42; *J. O.,* November 27, 1907; French decree promulgating, November 2, 1907.

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24 INTERNATIONAL CONFERENCE FOR SUPPRESSION OF WHITE SLAVE TRAFFIC opened at Brussels.

28 COLOMBIA, by note of this date, announced to Switzerland her adhesion to the Geneva convention of July 6, 1906.

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1 BELGIUM—GERMANY. Arrangement to prevent spread of contagious diseases takes effect. Supersedes arrangement effected by exchange of notes June 7 and 19, 1889. *B. Usuel,* September 11; *Monit.,* September 11.

2 FRANCE—GREAT BRITAIN—NORWAY. Declaration signed at Christiania concerning abrogation as regards Norway of the treaty between France, Great Britain and Norway and Sweden, November 21, 1855 (*State Papers,* 45:33), under which the integrity of Norway and Sweden as against Russia was guaranteed by France and Great Britain. *Q. dipl.,* 24:694.

2 FRANCE—GERMANY—GREAT BRITAIN—NORWAY—RUSSIA. Treaty signed at Christiania concerning the integrity of Norway. *The integrity of Norway, North China Herald,* 85:365; *Mem. dipl.,* November 24. "If the integrity of Norway is threatened, the contracting powers engage, after communication received from Norway on the subject, to lend their support to Norway to safeguard its integrity by the means that shall be judged most appropriate." Term, ten years and until denouncement. *Europe's guarantee of Norway's neutrality, R. of Reviews,* January, 1908.

2 GREAT BRITAIN. Order in council providing for the exercise of British jurisdiction in the New Hebrides in accordance with the terms of the convention signed at London, October 20, 1906, as amended by notes exchanged at London, August 29, 1907. *London Ga.,* November 15.

2 GREAT BRITAIN—ROUMANIA. British order in council under subsection (1) of section 234 of the Merchant Shipping Act, 1894, declaring that deserters from Roumanian merchant ships shall be liable to be apprehended and conveyed on board their respective ships. *London Ga.,* November 5.

2 SWEDEN. Adhesion to international convention of October 14, 1890, respecting railway freight transportation. *J. O.,* November 22, 1907.

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3 INTERNATIONAL. Closure at Brussels of procès-verbal of deposit of ratifications of the convention signed at Brussels November 3, 1906, revising the duties imposed by the Brussels convention of June 8, 1899, on spirituous liquors imported into certain regions of Africa. *J. O.*, November 3, 10, and 13, 1907; *Ga. de Madrid*, May 1; *Staatsb.*, 1907, No. 279; *Cd.*, 3264; *G. B. Parliamentary debates*, 170:52; *Treaty ser.*, 1907, No. 46; *B. de statistique et de législation comparée*, 23:437. Ratifications deposited: Great Britain, February 9, 1907; Spain, April 4, 1907; Kongo, April 6, 1907; Sweden, June 7, 1907; Russia, June 11, 1907; Belgium, June 19, 1907; Italy, July 11, 1907; Germany, October 16, 1907; Portugal, October 30, 1907; Netherlands, November 2, 1907; France, November 3, 1907. The convention enters into effect December 2, 1907. *See May 11, 1907.*

4 BELGIUM—HOLLAND. Joint committee in session at Brussels to seek means of establishing closer relations between the two countries. The delegates were divided into six subcommittees on (1) unification of postal rates, means of transportation, customs regulations, etc.; (2) labor legislation, execution of foreign judgments; (3) intermediate and higher education, correspondence of diplomas; (4) maritime question; (5) middle classes; (6) agriculture. *Sauvé: Le rapproachement hollando-belge, Q. dipl.*, 24:661; *Mem. dipl.*, November 10.

6 HONDURAS—NICARAGUA—SALVADOR. Act signed at Amapala by presidents of the three republics. Stipulates that a Central American peace congress be held at Amapala after the Washington conference (see *November 14*); invites Guatemala and Costa Rica to adhere; declares in force all treaties which uphold their international friendship and harmony. *Diario de Centro-América* (Guatemala), November 14; *Manifiesto....presidente provisional de Honduras ante la asamblea nacional constituyente 1908*, Tegueigalpa.

6 BRAZIL—URUGUAY. Brazilian decree approving protocol signed at Rio de Janeiro, December 12, 1906, modifying article 4 of agreement of February 14, 1879. Letters rogatory. *B. A. R.*, January, 1908; *Mensagem....pelo presidente* (Rio de Janeiro, 1907).

8 BRAZIL. Congress approved international radiotelegraphic convention signed at Berlin, November 3, 1906. *B. A. R.*, January.

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9 GERMANY—ITALY. Treaty signed respecting literary and artistic property. This treaty, like that between Belgium and Germany of October 19, is in pursuance of the resolution of the Paris conference of 1896 in favor of simplification of particular literary arrangements between union states; Germany, Belgium and Italy being members of the international union for the protection of literary and artistic property. *Dr. d'auteur,* January, 1908.

12 GUATEMALA. Executive order. Prohibiting entry of Chinese even though possessed of Guatemalan passports. Due to abuse of passports. *El Guatemalteco,* November 13.

14 RUSSIA. Third Duma opened at St. Petersburg. *Times,* November 14, 15; *Mem. dipl.,* November 17; *R. of R.,* 37:91.

14 COSTA RICA—GUATEMALA—HONDURAS—NICARAGUA—SALVADOR. Opening of peace conference in Washington. Adjourned December 20. Eight treaties signed on the latter date providing for (1) general peace and amity, (2) additional articles to same, (3) the creation of a Central American court of justice, (4) uniform extradition laws, (5) annual conferences for uniformity in monetary systems, tariffs, weights and measures, (6) the establishment of better means of communication and transportation, (7) the establishment of a pedagogic institute in Costa Rica, (8) the establishment of a Central American Bureau similar in its functions to the Bureau of American Republics. Proceedings and treaties in *B. A. R.,* December. *B. oficial de la secretaría de relaciones exteriores* (Mexico), October, 1907.

15 FRANCE—GREAT BRITAIN. Arrangement signed at London to prevent as far as possible evasion of duties on successions. Ratifications exchanged at London, December 9, 1907. *J. O.,* December 14; *Times,* December 14. French decree of ratification, December 13, 1907. Text in *B. de statistique,* 31:585; also in *R. de dr. int. privé,* 3:976; study on same by *Wahl, id.,* 1908, No. 1.

16 PRUSSIA—SWEDEN. Convention signed at Berlin for establishment of ferry service for transfer of trains between Sassnitz and Trelleborg. *Mem. dipl.,* November 24.

16 BELGIUM. Invitation to foreign powers to participate in Brussels Exposition in 1910.

*November, 1907.*

18 BELGIUM—GERMANY. Promulgation at Berlin of convention signed at Berlin August 13, 1903, for bettering railway communication between Prussia and Belgium. *Preuszische Gesetzsammlung,* 1907, No. 43; *Reichs-G.,* 1907, No. 47.

18 MEXICO. Ratification by president of international convention signed at Rio de Janeiro, August 13, 1906, extending until December 31, 1912, the treaty on pecuniary claims signed at Mexico January 30, 1902. *B. A. R.,* December. Approved by Mexican Senate October 23, 1907.

19 GREAT BRITAIN—UNITED STATES. Commercial agreement signed at London. Provides for the application of the minimum rate under the third section of the tariff act of the United States approved July 24, 1897, to works of art, being the product of the industry of the United Kingdom, in return for the free admission of samples of dutiable goods brought into the territory of the United Kingdom by commercial travelers of the United States. President's proclamation, December 5, 1907. *Treaty ser.,* 1907, No. 44; *Stat. at L.,* vol. 35.

26 BULGARIA—GREAT BRITAIN. Ratifications exchanged at Sofia of commercial convention, protocol and declaration signed at Sofia, December 9, 1905. *Treaty ser.,* 1908, No. 1.

26 MOROCCO. Beni-Snassen cross Algerian frontier. For details, *Mem. dipl.,* December 1. On indemnity for injuries to property of foreigners at Casablanca July 31, *q. v.,* see *J. du dr. int. privé,* 34:1257. *Mem. dipl.,* November 10; *de Pressensé: France, Morocco and Europe, Contemporary R.,* 92:731; *Sabatier: L'erreur d'Algésiras, R. politique et parliamentaire,* 55:248; *Brown: The bombardment of Casablanca, Cornhill Magazine,* 23:748; *de Caix: L'affaire du Maroc, Le livre jaune, Q. dipl.,* 24:629; *id.,* 24:785; *Duschesne-Fournet: Quelques reflexions sur le problème marocain, Q. dipl.,* 24:637; *Doc. dipl.: Affaires du Maroc 1901–1905, protocoles et comptes rendues de la conférence d'Algésiras, affaires du Maroc III, 1906–1907; Leroy-Beaulieu: La France dans l'Afrique du Nord. Le Maroc, R. des deux mondes,* 43:5; *Delafosse: The problem of Morocco, National R.,* 50:869; *France and Morocco, Spectator,* January 18, 1908; *The position of France, Spectator,* February 1, 1908. For terms of amnesty to the Beni-Snassen, see *Q. dipl.,* 25:53.

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29 BELGIUM—KONGO. Treaty signed at Brussels for cession of the Kongo Free State to Belgium. Text, *Times,* December 7. *Deibel: Hèt Congovraagstuk, De Gibs,* October, 1907; *Lorrand: Le Congo et la Belgique, La Grand R.,* 46:43; *Goffart: La mise en valeur de l'état du Congo, La R. générale,* 86:40; *Taylor: The Congo Free State, American Law R.,* 41:102; *Spectator,* January 4; *Times,* October 26, November 7. The December, 1907, number of the *Official Organ of the Congo Reform Association* contains a map showing concessions in the Kongo Free State; text, *Q. dipl.,* 24:845; *A new era for the Congo, Nation,* 85:558; *Lorrand: Belgian opinion on the Congo question, Contemporary R.,* February, 1908.

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HENRY G. CROOKER.

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Naturalization laws and regulations, Sept. 23, 1907. 26 p. *Bureau of immigration and naturalization.* Paper, 10c.

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[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

[2] Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London; cd. refers to papers presented to Parliament by command.

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Persia, Afghanistan and Thibet. Signed at St. Petersburgh, Aug. 31, 1907. *Foreign office.* (cd. 3753.) 1d.

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Sweden, agreement between the United Kingdom and, respecting the estates of deceased seamen. Oct. 5, 1907. *Foreign office.* (cd. 3779.) ½d.

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PHILIP DE WITT PHAIR.

# JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

## THE KING V. THE GOVERNOR OF BRIXTON PRISON.

### *Ex parte* VAN DER AUWERA.

*[1907] 2 King's Bench Division, 157.*

Extradition — Crime Committed in Belgium — Prescriptive Period for Punishment — Order of Committal to Await Surrender Made Within Prescriptive Period, but During Time Prisoner Serving Sentence for Crime Committed in England — Arrest under Order of Committal After Expiration of Prescriptive Period — Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 3, sub-s. 3; ss. 10, 11 — Extradition Treaty Between United Kingdom and Belgium of October 29, 1901, arts. 9, 11 — Belgium Penal Code, arts. 92, 96.

Rule *nisi* calling on the governor of Brixton Prison to shew cause why the applicant, Michel Louis van der Auwera, who had been committed to Brixton Prison by a metropolitan magistrate, there to await his surrender to the Belgian Government, should not be brought up and discharged upon the ground that, by art. 92 of the Belgian Penal Code, the offence for which the applicant was sentenced was no longer punishment in Belgium, the period of prescription having expired. On June 28, 1901, the prisoner was convicted of larceny in Belgium in his absence par contumace. The time for appealing expired on July 9 following. The prescriptive period of five years, which is fixed by art. 92 of the Belgian Penal Code,[1] then began to run. On February 8,

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[1] The following translation of the material portions of the Belgian Penal Code, the Code d'Instruction Criminelle, and the Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals, dated October 29, 1901, was used by the Court:

Belgian Penal Code, art. 92: "Correctional punishment will be lost by prescription after five completed years, counting from the date of the decree or judgment given in the last resort, or counting from the day when the judgment given in first instance could not longer be contested by way of appeal."

Art. 96: "Prescription of punishment" (that is, the period after which exemption from punishment takes place through lapse of time) "will be interrupted by the arrest of the convicted person."

Code d'Instruction Criminelle, s. 476: "If the accused surrenders, or is

1906, he was arrested in England on a charge of obtaining money by false pretences in England. On March 9, 1906, he was committed for trial at the Central Criminal Court in regard to that charge, and on April 4, 1906, was sentenced to twelve months' hard labour. On March 9, 1906, he was committed to His Majesty's prison at Brixton by a metropolitan magistrate under s. 10 of the Extradition Act, 1870, there to await the warrant of a Secretary of State for his surrender, which had been claimed by the Belgian Government for the larceny of which he had been convicted in Belgium, and on the same day the magistrate certified his committal to the Under-Secretary of State for the Home Department. On being liberated on the expiry of the sentence on

arrested before his sentence has been extinguished by prescription, the judgment by default and all the proceedings against him from the date of the warrant for his arrest * * * shall be nullified as of right, and the case shall be proceeded with in ordinary form."

Sec. 641: "In any case, those who have been condemned by default or for contumacy, and whose sentence has been prescribed, shall not be allowed to appear and purge their contempt or contumacy."

Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals, dated October 29, 1901, art. 1, clause 29: "In no case can the surrender be made unless the crime shall be punishable according to the laws in force in both countries with regard to extradition."

Art. 9: "The surrender shall not take place if, since the commission of the acts charged, the accusation, or the conviction, exemption from prosecution or punishment, has been acquired by lapse of time, according to the laws of the country where the accused shall have taken refuge."

Art. 11: "If the individual claimed should be under process, or condemned by the Courts of the country where he has taken refuge, his surrender may be deferred until he shall have been set at liberty in due course of law. In case he should be proceeded against or detained in such country on account of obligations contracted towards private individuals, his surrender shall, nevertheless, take place, the injured party retaining his right to prosecute his claims before the competent authority."

Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 3, sub-s. 3: "A fugitive criminal who has been accused of some offence within English jurisdiction, not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise."

Sec. 10: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, February 16, 1907, he was immediately re-arrested and detained under the committal order of March 9, 1906. The question was whether, as the period of five years from the date when the applicant could have appealed against his sentence in Belgium (July 9, 1901) expired on July 9, 1906, he could now be extradited.

Sir J. Lawson Walton, A.-G., and S. A. T. Rowlatt shewed cause. Two questions arise. The first question is whether the fact that there has been a lapse of time during which a prescription rule operates in Belgium is any ground for refusing to hand the prisoner over to the Belgian authorities. There is no express provision upon the point either in the Extradition Act, 1870, or in the treaty between the United Kingdom and Belgium for the mutual surrender of fugitive criminals

the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the commital, and such report upon the case as he may think fit."

Sec. 11: "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

"Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

"It shall be lawful for any person to whom such warrant is directed and for the person so authorized as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign State the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape."

of October 29, 1901. It may, therefore, be that this country is bound to hand him over, and that he must set up the defence of prescription in Belgium. The second question is whether under art. 96 of the Belgian Penal Code the period of prescription has in fact expired.

As to the first question, the prisoner must set up the provision for prescription contained in art. 92 of the Belgian Penal Code in Belgium. As to the second question, his arrest in this country suspended the operation of the prescriptive period under art. 96 of the Belgian Penal Code. The extradition treaty with Belgium of October 29, 1901, includes larceny as an extraditable crime. The only limitation on the right of Belgium to have a criminal handed over to her is where, according to the prescriptive laws of the United Kingdom, the crime ceased to be punishable. There is no provision in the treaty for a crime ceasing to be the subject of extradition owing to prescription in Belgium. Art. 9 of the treaty contemplates the case of a crime losing its criminal character after a lapse of years in the country of refuse, which causes the crime to lose its criminal character at the end of five years; and, therefore, there is a duty to hand him over.

As to the Belgian Penal Code it may be a question for the Belgian Courts to determine whether the term "arrest" in art. 96 applies to an arrest in Belgium as well as to an arrest in this country. That may be a nice question, depending upon the object with which art. 96 in the Penal Code was inserted; but it is sufficient for this Court to consider that the point is one that could be raised in Belgium, and ought to be raised there by way of defence if it is sought to place the accused upon his trial there, or if it is sought to imprison him there under the conviction which has taken place there. It is a matter for the Belgian Courts, and not for the Courts of the United Kingdom. Although the word "arrest" may be of doubtful application, that is a matter for the Belgian Courts to consider. If the word "arrest" applies to arrest and imprisonment in this country, it is clear that the prescriptive period has not come to an end. The accused is a criminal who has not suffered his punishment, and as there is no prescription in the United Kingdom, there is no reason why he should not be extradited.

R. W. Barnett, in support of the rule: The applicant has only been committed to prison, there to await the warrant of the Secretary of State. By s. 11 of the Extradition Act, 1870, when the magistrate has committed a person to prison under s. 10 of the Act of 1870 two duties fall upon him; he must first communicate to the Secretary of State the fact that he has so committed the prisoner, and he must also tell the prisoner that he is entitled to apply for a writ of habeas corpus, and that he will not be deported for fifteen days. The effect of s. 3, sub-s. 3 of the Act of 1870 is simply that the law of England asserts itself against the law of the foreign country. No notice is taken of a request for extradition until the prisoner has served his term of imprisonment in the United Kingdom. Art. 9 of the treaty of 1901 does not contemplate the possibility of Belgium desiring the extradition of a criminal who is no longer punishable there.

If, at the present moment, the prisoner is not punishable in Belgium because the prescriptive time has expired, he is improperly imprisoned in this country. He ought now to be discharged, because the committal order of March 9, 1906, is now of no force, inasmuch as he can no longer be punished for the offence in Belgium. The Secretary of State cannot properly issue his warrant when he is informed that the prisoner can no longer be punished. Art. 96 of the Belgian Penal Code says that the prescription of a sentence shall be interrupted by the "arrest" of the condemned. The word "arrestation" must mean arrest by a Belgian officer. But even if "arrestation" means arrest at the instance of the King of the Belgians by an officer of the English law, the arrest in the present case only took place on February 16, 1907, and at that time the period of prescription in Belgium had run. The onus is on the respondent to shew that "arrestation" in art. 96 of the Belgian Penal Code means arrest in England by an officer of the English law for an offence against the English law.

There has been no arrest at the instance of the King of the Belgians. The committal order of March 9, 1906, is on the face of it only to become operative when the term has been served for the offence with which the prisoner was charged in the United Kingdom; and when that term was served the applicant for the first time was detained under that order. The word "arrestation" in s. 96 of the Belgian Penal Code means an arrest by the Belgian authorities for an offence against Belgian law. It is for this Court to decide what the meaning of the word is. If the surrender of the prisoner is delayed under s. 3, sub-s. 3, of the Extradition Act, 1870, until the prescriptive time has run in Belgium, the effect of the order of committal made by the magistrate is destroyed. That, however, is a piece of good fortune for the prisoner, resulting from the fact that in that particular case the English law predominates. As to the contention that the prisoner can apply for relief to the Belgian

Court if he is surrendered, it is clear from s. 641 of the Code d'Instruction Criminelle that he cannot appear. His sentence having been prescribed, he is now under the stigma of the sentence, and has no right to go before a tribunal in Belgium.

LORD ALVERSTONE, C. J.: In my opinion this rule must be discharged. I express no opinion as to what may be the proper view to be taken where proceedings before a magistrate with a view to obtaining an order for committal of the accused to prison, there to await the warrant of the Secretary of State for his surrender, are taken after such a period as to prevent the offence in respect of which the surrender of the accused is claimed being punishable in the foreign country. That point does not arise in this case. I wish, therefore, to express no opinion as to what would happen if effective proceedings before the magistrate of England had not been taken before the expiration of the Belgian prescriptive period of five years. On March 9, 1906, the metropolitan magistrate made the committal order. The order for committal of March 9, 1906, was rightly made under s. 10 of the Extradition Act, 1870; and if the prisoner had not been undergoing his sentence under his conviction in the United Kingdom, the Secretary of State would, under s. 11 of the Act of 1870, have issued his warrant ordering the surrender of the prisoner to some duly authorized person in order that he might be conveyed to the foreign country. On behalf of the applicant it is contended that, because it is now more than five years from the commencement of the prescriptive period in Belgium, the warrant of the Secretary of State ordering the surrender of the applicant ought not to be issued. The committal order of March 9, 1906, seems to me to be authorized by the express language of the Act of 1870, and terms of the treaty between the United Kingdom and Belgium for the surrender of fugitive criminals dated October 29, 1901. I should not give effect to a technical argument such as that advanced before us on behalf of the applicant unless I were compelled to do so. But having regard to s. 3, sub-s. 3, of the Extradition Act, 1870, and to articles 9 and 11 of the Belgian treaty of October 29, 1901, I think the matter is reasonably clear. Art. 11, in my opinion, shews that the contracting parties have exactly appreciated the position, viz., that the law of the country in which refuge has been taken may have to be enforced before the surrender is made. It is unnecessary to consider the effect of the provisions of the Belgian Penal Code, but speaking for myself, I am not prepared to say that we should consider or determine any minute questions of law with reference to the rights of the surrendered person after his return to Belgium. It is quite plain that there are two possible views as to the meaning of the word "arrestation" in art. 96 of the Belgian Penal Code. That question may be for the Belgian Court to decide, but the point does not arise, in my opinion, in the present case.

I am of opinion that the rule must be discharged upon the ground that there was a valid order for committal on March 9, 1906, in respect of which the Secretary of State might at the end of fifteen days have issued his warrant for the surrender of the prisoner were it not for the fact that his power to do so was suspended until the punishment inflicted upon the applicant by English law had been undergone.

DARLING, J.: I agree, having regard to the particular facts, and especially to the dates, in the present case, but I wish especially not to be supposed to decide the point which may possibly arise in future, viz., the meaning of the word "arrestation" in s. 96 of the Belgian Penal Code. On behalf of the respondent it was said that if the applicant presented himself in Belgium and asked to be tried, he, being sentenced par contumace, would have a right to be tried notwithstanding the expiration of five years from the date of his sentence. A great deal might depend upon that fact, if it were not for the date of the warrant of commitment by the metropolitan magistrate, because s. 476 of the Code d'Instruction Criminelle provides that if the accused surrenders himself to prison or is arrested before the expiration of his sentence by prescription, then the judgment given par contumace and the proceedings taken against him shall be at an end. But the applicant has been in England during the whole time; he has not surrendered himself in Belgium, nor has he been arrested by a Belgian officer in Belgium, during the time of the running of the period of prescription. In these circumstances s. 641 of the Code d'Instruction Criminelle applies. That section says that in any case persons condemned by default or par contumace, and whose punishment is prescribed, shall not be allowed to present themselves and to get rid of the defect in their sentence, that is to say, they cannot be allowed to present themselves for trial again to get rid of the effect of the sentence par contumace. The prescriptive time in Belgium would have been completed if the arrest in England does not interrupt it, and if we were not absolutely right about the date of the warrant of commitment by the English magistrate for the English crime that fact would raise a difficulty. If the effect of the arrest of the applicant in England is that under art. 96 of the Belgian Penal Code he would have a right to go before the Belgian Court and say: "I have been under arrest within the meaning of that article," it is clear that the prescriptive period in Belgium might thereby be interrupted. I think it right to point out that, but for the date of the warrant of committal of the metropolitan magistrate, a difficult matter might have arisen for our consideration. A person might apply in Belgium under s. 476 of the Code d'Instruction Criminelle for a re-trial, and he might thereupon be met by an objection under s. 641 of the Code saying that the prescriptive time from the date of his sentence had run out. He would then, I think, contend, with a great deal of force if he had been under arrest in England, "Now I claim the benefit of s. 96 of the Penal Code. My prescription was interrupted by 'arrestation,' viz., by my arrest in England. I ought to be allowed to rely upon that arrest," because nothing can more certainly prevent a Belgian who wishes to present himself to the Belgian Courts to be tried for a crime which he has committed there, and for which he has been sentenced par contumace, from doing so than an arrest in a foreign country where nobody takes any interest in him, and he is kept in gaol during the whole of the Belgian period of prescription, of which he might wish to avail himself. I think but for one fact occurring, viz., the issue by the magistrate on March 9, 1906, of the warrant of committal, this case might give rise to very difficult questions; and I should not in the least desire to be supposed to have affected to decide any one of them.

A. T. Lawrence, J.: I agree that this rule must be discharged. It is admitted that there was no sufficient lapse of time to afford any exemption from surrender when the order of committal of March 9, 1906, was made. It seems to me that that order of committal has been in force from that time up to the present. It has merely been suspended by the operation of the conviction here, as provided for by the Extradition Act, 1870. Any rights that the applicant may have according to Belgian law he can set up in Belgium, and they will be given their due weight and force.

Rule discharged.

### THE KING V. THE GOVERNOR OF BRIXTON PRISON.

### *Ex parte* CALBERLA.

*[1907] 2 King's Bench Division, 861.*

**Extradition — Discharge of Criminal — Exemption from Punishment Acquired by Lapse of Time — Treaty Between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, arts. 4, 5.**

Rule *nisi* calling upon the governor of Brixton Prison to show cause why a writ of habeas corpus should not issue directing him to have in the King's Bench Division the body of the applicant, one Julius Alexis Calberla, who had been taken and detained in custody under an oath for extradition dated June 28, 1907.

On September 22, 1902, the applicant was in the Oldenburg Grand Ducal Provincial Court, in the Empire of Germany, convicted of four several offences, three of which were extradition crimes. Of these three offences he was sentenced to two years' imprisonment for the first, two years' for the second, and one for the third. For the fourth offence, which was not an extradition crime, he was sentenced to six months' imprisonment. In pursuance of art. 74 of the Penal Code (Strafgesetzbuch) of the German Empire, these various sentences were collected into one sentence for a term of four years.

The applicant had already, on September 22, 1902, been imprisoned under a remand for a period of six months, and by the sentence of the Court it was ordered that this period of six months should be deemed to have been imprisonment in pursuance of the sentence. He had therefore practically to serve a term of three years and six months under the sentence. This sentence was confirmed by the judgment of the Supreme Court of Appeal in Germany, and on May 11, 1903, the applicant was sent to prison to serve a term of four years from November 11, 1902.

On or about October 21, 1903, owing to the fact that further imprisonment would have endangered his life, Calberla was transferred in custody to a hospital at Vechta, which was then used for the purpose of keeping in custody prisoners who, owing to the state of their health, could not remain in prison. He remained in custody in the hospital until February 4, 1904.

By an order of the Oldenburg Court dated February 24, 1904, and made under s. 493 of the Criminal Procedure Ordinance (Strafprozessordnung) of the German Empire, it was adjudged that the period spent by the applicant in the hospital up to February 4, 1904, should be reckoned in the period of punishment. On the last-named date he had undergone six months and about two hundred and seventy days of the collective sentence of four years, and had over two years' imprisonment still to serve.

By s. 487 of the Criminal Procedure Ordinance, the execution of a sentence may in certain cases be postponed or suspended if the further execution thereof gives cause to anticipate imminent danger to the life of the criminal. On February 4, 1904, in pursuance of that section, Calberla was permitted to go at large on the ground that further execution of the sentence caused apprehension of imminent danger to his life. It appears that a release from custody under this section is not an absolute discharge, but that the criminal may subsequently be called upon to undergo the residue, if any, of his sentence. He remained in the hospital for one year after being permitted to go at large as aforesaid.

On October 19, 1905, Calberla, the applicant, was by the directions of the State attorney of the Duchy of Oldenburg called upon to enter upon his punishment again on November 1, 1905, or else by that day to forward a certificate of the doctor at the prison at Vechta that a further execution of his sentence would cause apprehension of imminent danger to his life. On his failure to produce any such certificate an order was made on November 7, 1905, by the State attorney that the applicant should enter again upon his punishment at the latest on November 12, 1905. He failed to comply with this order, and on November 15, 1905, the State attorney issued an order that he should be arrested for the purpose of undergoing the remainder of the sentence of four years' imprisonment.

In April, 1907, an application was made to the Bow Street Police Court for his extradition, and an order was made under which Calberla was taken and detained as above stated.

The Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals, signed at London, May 14, 1872, provides, by art. 4, that "the extradition shall not take place if the person claimed on the part of the Government of the United Kingdom, or the person claimed on the part of any of the Governments of the German Empire, has already been tried and discharged or punished, or is still under trial in one of the States of the German Empire, or in the United

Kingdom, respectively, for the crime for which his extradition is demanded * * *;" and by art. 5, that "the extradition shall not take place if, subsequently to the commission of the crime, or the institution of the penal prosecution, or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the State applied to."

W. H. Sands obtained a rule *nisi* for a writ of habeas corpus on the following, among other grounds: (1) That the applicant had been lawfully discharged from custody by the German Court; and (2) that the period of his sentence had expired before the extradition proceedings were instituted.

Sir J. Lawson Walton, A.-G., and Rowlatt shewed cause. There are two questions in this case. The first question is what is the meaning of "discharged" in art. 4 of the treaty of 1872. The words in the German version of the treaty are "ausser Verfolgung gesetzt," and the expression indicates a final discharge from further prosecution or punishment — not, as in this case, a mere permission to go at large on account of ill-health, with an obligation to return to prison if the criminal's health so far improves that he can serve the residue of the term of his imprisonment without danger to his life.

The second point is that exemption from punishment has been acquired by lapse of time according to the laws of the State applied to for extradition, *i. e.*, the United Kingdom, within the meaning of art. 5 of the treaty. This contention is based on the fallacy of taking the sentence of the German Court as being the sentence of an English Court. An English sentence runs continuously de die in diem from the day on which it is pronounced, and no doubt if this had been an English sentence it would have expired in four years from November 11, 1902, and the criminal could not afterwards be further punished for the crime for which he was sentenced. But that is not the case with this German sentence, which must be taken to be a legal and valid sentence, and one which the German Court was competent to pronounce. By German law a sentence may have an intermittent effect, and a convict may be released temporarily on the terms that he shall return to prison to finish the term of his sentence. The question is not whether such a sentence would be valid by English law, but whether, taking the sentence as it stands, exemption from its operation has been acquired by lapse of time according to the laws of England, which clearly has not happened.

By s. 10 of the Extradition Act, 1870 (33 & 34 Vict., c. 52), in the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of the Act) would, according to the law of England, prove that the prisoner was convicted of such a crime, the police magistrate shall commit him to prison. By s. 26 of the Act the term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State who is in, or is suspected of being in, some part of His Majesty's dominions. Accordingly, if a person convicted of an extradition crime committed within the jurisdiction of the foreign State, Germany in the present case, is found here in England, it is the duty of this Government to surrender him to the German authorities unless he can shew some legal reason to the contrary. The reasons offered in the present case are insufficient.

J. P. Grain and W. H. Sands, in support of the rule: First, the applicant was on February 4, 1904, discharged within the meaning of art. 4 of the treaty of 1872 when he was allowed to leave the hospital on account of his health. It is common ground that he had been tried; and therefore, by the terms of that article, the extradition is not to take place.

Secondly, exemption from punishment has been acquired by lapse of time according to the laws of the State applied to for extradition, *i. e.*, the United Kingdom. . If this sentence of four years' imprisonment had been pronounced by an English Court it would have expired by lapse of time on November 11, 1906. Therefore, by art. 5 of the treaty, extradition is not to take place after that date. The application for extradition was not made until April, 1907.

Lord Alverstone, C. J.: The sentence of three and a half years' imprisonment, by reason of the criminal having been in prison for some time, commenced in May, 1903; in October, 1903, he was removed in custody to a hospital, and in February, 1904, he was allowed to go at large on grounds of health. Therefore a considerable portion of the original sentence remains to be served. On November 15, 1905, an order was made that Calberla should be re-arrested and should undergo the remainder of the sentence. In these circumstances it is said that, inasmuch as this application for an order for surrender was not made until April, 1907, and as the full term of imprisonment, if it had run continuously, would have expired on November 11, 1906, the order cannot now be made. That contention is based upon two articles of the extradition treaty with Germany of 1872. Art. 4 of that treaty provides that the extradition shall not take place if the person claimed on the part of the Government of the United Kingdom, or the person claimed on the part of any of the Governments of the German Empire, has already been tried and discharged or punished. First, it is said that Calberla was discharged in February, 1904, and cannot, therefore, be extradited under that article.

Whatever may be the correct translation of the operative words in the order of the German Court permitting the prisoner to go at large on account of his health, it seems clear that those words did not operate to discharge him from punishment in the sense that he was no longer amenable to punishment; and in my opinion art. 4 cannot refer to the case of a man who has been released from custody according to German law upon the terms that he shall come back again to complete his sentence. We must accept the order made by a competent Court that he is to go back for that purpose, and therefore hold that there is no evidence of a discharge within the meaning of art. 4 of the treaty.

Then art. 5 was relied on. That article provides that the extradition shall not take place if, subsequently to the commission of the crime, or the institution of the penal prosecution, or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to. It is contended that the sentence would have expired, according to our law, on November 11, 1906, and that therefore this man ought not to be extradited.

The idea underlying art. 5 seems to be the application of principles of international justice, and that idea is realized by providing that where the State applied to would not, according to its laws, allow the criminal to be punished, or further punished, owing to lapse of time, he shall not be punished, or further punished, by the State applying for his extradition. I have had some doubt whether, inasmuch as by our law punishment runs continuously from the date of the sentence, it might not be said that at the expiration of four years from November 11, 1902, exemption from punishment had in this case been acquired by lapse of time on November 11, 1906. But I think that art. 5 had in view the fact that Germany has certain prescribed limits of time within which alone an offender may be punished after the date of the offence. It is an article framed with a view to the laws of the State applied to, where that State by its laws puts a limit upon the time within which a prosecution may be instituted or punishment inflicted. According to our system of procedure, with one exception, the whole term of the punishment for a crime must be served continuously from the date of the sentence; it does not allow us to execute a punishment or to keep a man in confinement after the expiration of that term, and, subject only to the statutes which allow a release on ticket of leave, punishment cannot be inflicted for the crime for which sentence has been passed after that term has expired. If a man, having obtained a ticket of leave, commits an offence, the original punishment must be completed; but, apart from special instances arising under certain statutes, an English sentence cannot be broken in upon, and can only be carried out within the time specified in the sentence. Does that fact constitute an exemption from punishment acquired by lapse of time according to the laws of England? In Germany a man may be allowed to leave prison on the ground of ill-health, with the obligation to return to custody and serve the rest of his term of imprisonment when his health permits; and under that law the order was made that this man should go back to prison and serve the rest of his sentence. It seems to me that there is nothing to exempt the applicant from punishment according to our law, and this rule must therefore be discharged.

Darling, J.: I am of the same opinion, and, except upon the meaning of art. 5, I do not desire to add anything to what my Lord has said. With regard to art. 5, I was for some time impressed by Mr. Grain's argument, but I am now satisfied that it ought not to prevail. In my view there is in this case no lapse of time giving exemption from punishment according to the laws of England, because our laws have for this purpose no application to the form of intermittent punishment which is in question here. The system which prevails in Germany has no parallel in this country.

Phillimore, J.: I agree, and have nothing to add.

Rule discharged.

### LODEWYK JOHANNES DE JAGER, APPELLANT,

### AND

### THE ATTORNEY-GENERAL OF NATAL, RESPONDENT.

[1907] *Appeal Cases, 326.*

High Treason — Resident Alien's Duty of Allegiance — Special Leave to Appeal.

This was a petition for special leave to appeal from a judgment reported in (1901) Natal L. R. p. 65, of a special Court constituted by Act XIV. of 1900 of the Colony of Natal, whereby on March 14, 1901, the petitioner was adjudged guilty of high treason and was sentenced to five years' imprisonment and to pay a fine of £5000.

It alleged that the petitioner was a burgher of the late South African Republic, who for ten years and at the date of the outbreak of war in 1899 was peacefully residing in Waschbank, in Natal, and continued to do so after the battle of Elandslaagte on October 21 of that year while the Boer forces occupied that part of Natal in which Waschbank is situated and the British forces had retired to Ladysmith, whereby he lost the effective protection of Her late Majesty; that the Boers administered the government and remained in occupation till March, 1900; that the petitioner was thereupon compellable to join, and did join, the Boer forces, and aided and assisted them both as commandant and as a commissioner and justice of the peace; and that after judgment as aforesaid he had undergone imprisonment and paid the fine imposed. The special Court was dissolved on March 12, 1903. The Act creating it neither granted nor withheld an appeal to Her late Majesty, and delay was due solely to financial difficulties. The petition sought special leave to appeal on the grounds that the judgment failed to distinguish between the allegiance which the petitioner owed to Her late Majesty while within her protection and the allegiance which he owed to the late South African Republic, between his rights and duties with regard to hostilities whilst he was actually enjoying the protection of the Queen and after he had ceased to enjoy it. It further contended that aid and assistance given to the South African forces after they had become capable of being compelled by those forces were justified and in no respect treasonable, involving the nature and extent of the rights and duties of a resident alien enemy and the due application of the law of high treason.

Sir R. Finlay, K. C., and A. R. Kennedy, for the petitioner, contended that the petitioner owed only a local and temporary allegiance to Her Majesty whilst he was a resident in Natal and was actually enjoying Her Majesty's protection. The obligation ceased to be binding upon him when he was deprived of that protection, and was de facto under the government and control of the South African Republic. Aid and assistance given to the Boer forces by the petitioner under those circumstances were not treasonable, but acts which he was legally compellable to perform. It was not alleged against him that he had joined the invading forces prior to their having become established in possession and government of the territory. Thereupon, as a burgher of the

Republic, he was compellable to serve. His duty of allegiance to the Queen had ceased, and his acts of service to his own Government were not treasonable as alleged. Reference was made to Cok's 3rd Inst. p. 4; Hale's Pleas of the Crown, vol. i, p. 94; Foster's Crown Cases, 2nd ed. (1776), 1st discourse, s. 2, 3rd ed. p. 185; 2 Halleck's International Law, 3rd ed. p. 450.

The judgment of their Lordships was delivered by

LORD LOREBURN, L. C.: The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV. of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or features of this case except the points of law upon which Sir Robert Finlay insisted.

It is an old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against whom it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition.

There will be no order as to costs.

### CABOT, PLAINTIFF,

### AND

### THE ATTORNEY-GENERAL OF QUEBEC, INTERVENANT.

[*1907*] *Appeal Cases, 511.*

**Grant from the Crown — Claim of Grantee to Exclusive Right to Fish from the Foreshore — Construction.**

Appeal from a decree of the above Court (March 10, 1906), affirming a decree of the Superior Court for Lower Canada in the county of Gaspé in the province of Quebec (September 10, 1904), and dismissing the appellant's action.

The issue in the case was whether the original grant under which the appellant claimed to be the owner of a signiory known as "la Grande Rivière" conferred upon him the sole and exclusive right of fishing in the waters of the Gulf of St. Lawrence in front of the boundary of the Seigniory.

The Seigniory has about four miles and a half frontage and a depth of about six miles. It abuts on the Gulf of St. Lawrence near the entrance of the Bay des Chaleurs. A river called the Grande Rivière flows through it and empties into the gulf.

The defendant Carbery, by virtue of fishing licences duly issued to him by the Government of the province of Quebec, claimed the right to fish in the waters of the gulf in front of the seigniory.

The respondent was allowed to intervene in the action brought by the appellant to enforce his claim, and denied that the grant was effectual to pass the exclusive right unless there were expressed words to that effect, and that no such words were in either the original grant of 1657 or in the confirmatory grant of 1750.

Macmaster, K. C., and Garneau, K. C., for the appellant, contended that the exclusive right claimed passed under the terms of the grants as a principal right of the concession which was en toute propriété, and was not merely an accessory to some other right the subject of the grant. There had been uninterrupted possession of the right, and the Government of the province had no right to grant the licences complained of to the defendant Carbery. The Act 18 Vict. c. 3, which abolished feudal rights, did not affect fishery rights.[1]

Sir E. Carson, K. C., Lanctot, K. C., and Hamar Greenwood, for the respondent, contended that the foreshore was not included in the grants, and that the exclusive right of fishing claimed did not pass by the grant of a seigniory unless such right had been by express words included in the grant. Those words were wanting in both the grants relied upon.

Macmaster, K. C., replied.

The judgment of their Lordships was delivered by

Lord Robertson: In 1898 the appellant purchased the seigniory and fief of Grand River, in the county of Gaspé, as described in the original deeds of concession, made of the said seigniory by the king of France, and containing about two leagues in front of the whole depth, and bounded, in front by the Gulf of St. Lawrence, in rear by the township Rameau, on one side towards the west by the seigniory of Pabos, with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along its frontage on the seashore. Other words follow, and other exceptions from the grant; but the real question is whether a grant of the king of France, to which the appellant admittedly has right, gives him the exclusive right to fish salmon ex adverso of the lands which are the primary subject of the grant. The Crown, in virtue of its ordinary and original right, has granted licences to certain persons to fish for salmon from the foreshore in question; and the pretension of the appellant is that the words of his grant from the French king gave him this exclusive right. It is necessary to keep in mind that while, formally, there is a plea that the possession has been according to the appellant's construction of the title (that is, exclusive on the part of the appellant) there is no evidence of this, and it was not maintained in argument.

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[1] Fraser v. Fraser (1893), R. J. Q. 2 C. B. R. 215.

The sole question is therefore of the effect of the grant of the French king, which in two forms, differing only in immaterial points, are set out in the Record. The appellant indicated that he had an argument on certain words "en tirant du costé du Cap Espoir vers l'Ile Percée," which, he contended, extended the boundaries of the grant of fishing beyond high-water mark. The fatal defect of this argument is that the words supposed to imply extension are equally applied to the grant of land as to the grant of fishing. And, indeed, the true meaning and use of the words "tirant vers" (according to so high an authority as Littré) is no more than to indicate the direction.

The question is therefore reduced to a very general one, which is quite settled in the law of Canada, and that is, what is the meaning of the words "avec droit de chasse, pesche et traite avec les sauvages dans toute l'étendue de la dite concession"? The effect of such a grant is defined in a passage cited in the judgment under review, and the soundness of the law so laid down is not impugned by the appellant. "Le droit de pêche formait partie du fonds commun de la colonie, mais sous la garde du roi, pour l'avantage de tous, et ne pouvait devenir exclusif sans quelque concession spéciale exprimée dans des termes plus formels que ceux qui se trouvaient dans la simple formule mentionée plus haut," and the "simple formula," in that case, was exactly that which is now under consideration. While the question is thus discussed under somewhat abstract terms, it is always to be remembered that the exclusive right claimed (and never exercised) implies a grant by the Crown of the exclusive use of the foreshore so far as fishing is concerned. All the arguments offered to their Lordships about the relative importance of fishing and land in such cases as the present were fully in view (and at less distance of time) of the Canadian jurists who have thus stated and developed the law. The appellant received no support from the

Canadian Courts, and their Lordships are entirely unable humbly to advise His Majesty otherwise than that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

## CHIN YOW, APPELLANT, V. THE UNITED STATES.

*In the Supreme Court of the United States, 1907.*

*No. 76, October Term, 1907.*

*Appeal from the District Court of the United States for the Northern District of California.*

MR. JUSTICE HOLMES:

This is a petition for habeas corpus by a Chinese person, alleging that he is detained unlawfully by the General Manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of the United States, born in San Francisco of parents domiciled there, but it discloses that the Commissioner of Immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within United States v. Ju Toy, 198 U. S. 253, and the petition was dismissed for want of jurisdiction, (presumably on the ground of that decision,) as sufficiently appears from the record, the reasons assigned for the appeal and the order allowing the same. But the petition further alleges that the petitioner was prevented by the officials of the Commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the Court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have. The question is whether he is entitled to a writ of habeas corpus on such a case as that.

Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the Courts. In order to decide what we must analyze a little.

If we regard the petitioner, as in Ju Toy's case it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, 198 U. S. 263, still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in Bird v. Jones, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts. De facto he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation without the process of law to which he is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But on the other hand as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The Courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that while it is not likely, it is possible that the officials misinterpreted Rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or Rule 7, commented on in United States v. Sing Tuck, 194 U. S. 161, 169, 170, as giving them some control or choice as to the witnesses to be heard. But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed. Writ of habeas corpus to issue.

Mr. Justice Brewer concurs in the result.

## REUBEN ROSSER MCDERMID V. ALICE FLYNN MCDERMID.

*In the United States Court for China.*

*At Shanghai, March, 1907.*

This is an action for divorce in which petitioner prays for an absolute divorce, the custody of the minor children and for general relief. Petitioner alleges adultery as the ground for divorce. Defendant demurs to the petition on the ground that this Court is without jurisdiction to hear and determine the case.

This raises the question whether the United States Court for China has authority to hear and determine matrimonial causes, including the power to grant absolute divorce and to decree separation from bed and board.

The jurisdiction of this Court is defined in Sections 1 and 4 of the Act of June 30, 1906, creating the Court. Section 1 of said Act provides that:

> A Court is hereby established to be called the United States Court for China, which shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States Consuls and Ministers by law and by virtue of treaties between the United States and China. (Jurisdiction in small civil and criminal cases excepted.)

Section 4 of said Act provides that:

> The jurisdiction of said United States Court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the Consular Court in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American Consular Courts in China, and all judgments and decisions of said Consular Courts, and all decisions, judgments and decrees of said United States Court shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the Common Law and the law as established by the decisions of the Courts of the United States shall be applied by said Court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China.

It will thus be seen that the jurisdiction of this Court is for all practical purposes the same as that exercised by the United States Consuls and Ministers in China prior to June 30, 1906, and no more.

It now becomes necessary to determine the jurisdiction in judicial matters of the United States Consuls and the United States Minister in China prior to the above-mentioned date. This involves an examination of the provisions of the treaties between the United States and China and the statutes of the United States passed pursuant thereto. The treaties between the United States and China of July 3, 1844, and June 18, 1858, contain the following provision:

> All questions in regard to rights whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government. (Sections 15 and 27 respectively.)

The "authorities" of the United States Government, referred to in the treaties, and the jurisdiction which they shall exercise are named and defined by an Act of Congress passed for the purpose of carrying into effect the terms of said treaties. This subject is covered by Sections 4083, 4085 and 4086 of the revised statutes which read as follows:

> Section 4083: To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the Minister and the Consuls of the United States, duly appointed to reside in each of those countries, shall in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority, herein described, which shall appertain to the office of Minister and Consul, and be a part of the duties belonging thereto, where and insofar as, the same is allowed by treaty.
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> Sec. 4085: Such officers are also invested with all the judicial authority necessary to execute the provision of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by Consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others provided for by such treaties, respectively.
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> Sec. 4086: Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as it is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the Common Law and the Law of Equity and Admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the Common Law, nor the Laws of Equity and Admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the Ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

It will be seen from these statutes that the jurisdiction, formerly exercised by Consuls and Ministers and now exercised by this Court, to hear and determine causes, is drawn from four sources.

First, — The provisions of the treaties between the United States and China.

Second, — Those statutes of the United States suitable to carry said treaties into effect, which have been extended over citizens of the United States in China.

Third, — The Common Law, including Equity and Admiralty, and —

Fourth, — The rules and regulations of ministers having the force of law, promulgated to supply defects and deficiencies in the laws of the United States and in the Common Law.

1. — It will be observed that the treaties merely outline in a general way the authority which shall be exercised by the Government of the United States in China over American citizens, leaving it to Congress to determine what tribunals shall exercise said authority, and the laws which said tribunals shall apply. It was manifestly the purpose of China to concede to the United States absolute and unqualified extraterritorial jurisdiction over her citizens in China. The question to be determined is how far Congress has gone in extending a system of jurisprudence to American citizens in China. This requires an examination of the abovementioned statutes.

2. — Turning now to a consideration of the statutes of the United States which have been extended to China, we find that no mention is made of the matter of granting divorce. It is but natural that this is so, because in the United States the regulation of all matters relating to the status of marriage is left to the States, in conformity with the provisions of Article 10 of the Amendments to the Constitution, which provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." It does not follow, however, that because Congress has not legislated on this subject for the people who live in the States, that it is without constitutional power to pass laws relating thereto applicable to American citizens living in China. It is sufficient to note here that up to the present time it has not done so.

3. — We now pass to a consideration of the Common Law as a source of authority for the exercise of jurisdiction over matrimonial causes. The term common law as used in the statute has been interpreted by this Court in the case of the United States versus Biddle to mean: "Those principles of the Common Law of England and those statutes passed in aid thereof, including the law administered in the Equity, Admiralty and Ecclesiastical Tribunals, which were adapted to the situation and circumstances of the American Colonies at the date of transfer of sovereignty, as modified, applied and developed generally by the decisions of the State Courts and decisions of the United States Courts, and incorporated generally in the Statutes and Constitutions of the States."

It now becomes necessary to examine the provisions of the Common

Law on the subject of divorce and "judicial" separation. According to Blackstone the English law recognized two kinds of divorce, the one total and the other partial.

> The one *a vinculo matrimonii* and the other merely *a mensa et thoro.* The total divorce must be for some of the canonical causes of the impediment existing before marriage, for in the case of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*, while divorce *a mensa et thoro* is nothing more than separation, which does not nullify the marriage. With us in England adultery is only a cause for separation from bed and board. (1 Blackstone's Commentaries, p. 141.)
>
> According to the earlier law of England, a marriage valid at the time of its solemnization was held to be indissoluble. Conjugal infidelity only furnished a ground for separation, but nothing short of death could release the nuptial bond. A complete annulment of the tie could only be obtained by the establishment of some antecedent impediment, such as undue consanguinity, physical incompetence, or mental incapacity. Until about the commencement of the 18th Century the Ecclesiastical Courts exercised exclusive jurisdiction over the subject of divorce. The Ecclesiastical Courts refusing to grant divorce *a vinculo*, even in cases of grossest conjugal delinquency, induced applications to Parliament, and it is said the first genuine example of a dissolution of the nuptial tie was in the case of the notorious mother of the highly gifted but unfortunate poet, Savage, — the Countess of Macclesfield. Since that time the Parliaments have exercised the power of annulling, absolutely, the marriage bond. (Wright v. Wright's Lessees, 14 American Decisions 725.)

The authorities all agree that prior to 1776 all judicial power to deal with divorce causes was vested exclusively in the Ecclesiastical Courts, and such power was limited to separation from bed and board, and that prior to that date all power of absolutely annulling the marriage bond was exercised by Parliament alone. The courts also hold uniformly that the power to grant a divorce in the United States is a statutory and not a common law power. It is usually vested in courts of law and equity, although in a few cases probate courts have been vested with this authority. In the absence of constitutional provisions or express legislation, no American tribunal has jurisdiction to grant divorce. (Sharon v. Sharon, 69 California 209).

This disposes of the Common Law authority for granting absolute divorce, but leaves to be considered the question whether there is sufficient warrant in the Common Law as above defined to authorize this Court to grant a separation from bed and board. This involves a consideration of the question whether the law on this subject, as administered by the Ecclesiastical Courts, constituted a part of the Common

Law of England which was introduced into the United States at the date of the change of sovereignty. As above pointed out, at the time we derived our common law from England, the Ecclesiastical or Church Courts had exclusive jurisdiction of causes relating to marriage and divorce. It was a dogma of the church that marriage was a divine institution, a sacrament not to be dissolved by divorce unless by direction of the head of the church. Marriage was, therefore, within the control of the Church Courts, and the Civil Courts had no jurisdiction. Whilst the principles of the Common Law which were applicable to the colonies were introduced into the United States and became the common law of the various states, yet not all of the Ecclesiastical Law was suited to the conditions and wants of the people. There were no Ecclesiastical Courts to administer the Ecclesiastical Law, and Courts of equity and common-law jurisdiction had no jurisdiction to hear and determine divorce causes until it was conferred upon them by statutes, and the statutes on the subject subsequently passed did not confer the full jurisdiction of the Ecclesiastical Courts upon the State Courts, but only jurisdiction to grant divorce and annul marriage in certain cases specified therein. The Ecclesiastical Law as a whole was not, therefore, adopted as a part of our common law. The jurisdiction conferred by the statutes was special and limited to the causes for divorce enumerated therein. Bishop in his work on Marriage and Divorce contends, that the fact that there were no courts in the colonies in which to administer the law of divorce as established in the Ecclesiastical Courts, is not a sufficient reason to warrant the conclusion that the common law of divorce did not follow the colonists to America. He says:

> As just stated in brief, English colonists to an uninhabited country carry with them to their new locality their English laws, except such as are inapplicable to their altered relations and circumstances. This general doctrine, in its applicability to this country, is every where recognized by our Courts, and in most of the States it has been confirmed either in the written Constitution or by legislative enactment. Nor is it material to this doctrine in what tribunal, in England, a law in question is there administered. Since every law from the mother country presents itself to a colony separated from the court of its origin, never, in reason, can its adoption or rejection depend on the name or constitution of such Court. In accord with this view is the language of the books, "all laws," and, though in some of the American cases the term "Common Law" is used, the broad meaning of the term, not its narrow and technical one, is intended. Moreover, the Courts of England have specifically held that the matrimonial law of the ecclesiastical tribunals is a branch of the law which the colonists take with them.

The position of Professor Bishop, however, is controverted by Chancellor Sanford in the case of Burtis v. Burtis (1st Hopkin's Chancery, 557 New York, 14 American Decisions 563). This is the leading case on the question now under consideration, and Chancellor Sanford treated the subject in an exhaustive manner. Since this Court is inclined to adopt the view announced by the Learned Chancellor, his opinion will here be quoted extensively. He says:

> The colony of New York never had any court possessing jurisdiction of matrimonial causes or power to grant divorce. No statute defining the causes of divorce or authorizing divorces in any case whatever was ever enacted by the legislature of the colony. Some special applications for divorces were made to the colonial legislature, but all such applications were refused. The Governor of the colony, with the consent of the Council, had power to establish courts of justice and all the courts of the colony derived their origin from this source of authority; but no court having cognizance of matrimonial causes or divorces was ever established in the colony. No court of the colony exercised very much jurisdiction and no law concerning divorce was ever enacted by the colonial legislature. It thus appears that the law of England concerning divorces and matrimonial clauses was never adopted by the colony of New York. It was not adopted in fact or in practice, and it was never the law of the colony. By the constitution of the State adopted in 1777, such parts of the Common Law of England and the Statute Law of England and Great Britain and of the Acts of the legislature of the colony as together formed the law of the colony on the 19th day of April 1775, were declared to be the law of this State. The law of the colony was thus adopted as the law of the State. The law of England concerning divorces and matrimonial causes not forming a part of the law of the colony, did not become the law of the State. I cannot admit that we have any other code on the same subject, and that the laws of England concerning divorces are also laws of this State. The English law concerning divorces and causes of divorce as it exists now, and as it existed while this State was a colony, is chiefly the Ecclesiastical Law and not the Common Law of that country. It is administered by judges and courts whose jurisdiction has never existed either in the State or the colony of New York, and it was evidently regarded by our ancestors of the colony and of the State as no part of the common law which they adopted. Our statutes are, clearly, original regulations, intended to authorize divorces in cases in which no divorce could before he obtained. They define the causes for which divorces shall be granted, they give jurisdiction of those cases in this Court, and they give no other jurisdiction. The specified cases are, with some differences, causes of divorce by the laws of England; but these statutes are evidently founded on the supposition that the causes of divorce which they define, were not causes of divorce by any pre-existing law in force in this State. In every view of these acts of our legislature they are substantive laws, authorizing divorces in the cases which they specify, and not authorizing divorce in any other case or for any other cause.

In our view the reasoning of the learned Chancellor as above set forth is entitled to greater weight than the ingenious and plausible argument of Professor Bishop and appears to be better supported by the authorities.

That no Court has a right to take jurisdiction of matters relating to the status of marriage unless such jurisdiction has been specially conferred by statute is a principle firmly established in American law and universally applied by American Courts. "A divorce cannot be had except in that Court upon which the State has conferred jurisdiction, and it can be had for those causes only, and with those formalities only, which the State has by statute prescribed." (Dennis v. Dennis, 68 Connecticut, 186; De Meli v. De Meli, 67 Howard Pr., N. Y., 20.)

In view of this rule and the fact that all of the States have dealt with the subject of matrimonial causes originally and with such striking lack of uniformity we are of opinion that the law of divorce as administered by the Ecclesiastical Courts of England has not been adopted generally by American tribunals as the basis of their decisions on the subject of divorce, and has not formed the substratum of the law of divorce as enacted by the various States; hence we conclude that said Ecclesiastical Law did not become a part of the Common Law within the meaning of that term as it has been interpreted by this Court.

4. — This leaves for consideration the question whether the regulations of the Minister on the subject of divorce conferred jurisdiction upon this Court to hear and determine matrimonial causes. Without entering upon a discussion of the question whether Congress has the constitutional right to delegate its legislative powers to a United States Minister to a foreign country it is sufficient for our purposes to inquire if our Minister has actually promulgated rules and regulations prescribing causes for divorce in China. The regulations of the Minister on this subject are found in Section VII of the Consular Court Regulations of 1864, and are as follows:

### SECTION VII, DIVORCE.

46. — Libels for divorce must be signed and sworn to before the Consul, and on the trial each party may testify.

47. — The Consul, for good cause, may order the attachment of libeller's property to such an amount and on such terms as he may think proper.

48. — He may also, at his discretion, order the husband to advance to his wife, or pay into Court, a reasonable sum to enable her to prosecute or defend the libel, with a reasonable monthly allowance for her support, pending the proceedings.

49. — Alimony may be awarded or denied the wife on her divorce at his discretion.

50. — Custody of the minor children may be decreed to such party as justice and the children's good may require.

51. — Divorce releases both parties, and they shall not be remarried to each other.

52. — Costs are at the discretion of the Consul.

It will be seen from the foregoing regulations that they do not undertake to prescribe the causes for which divorce may be granted, but purport to be little more than rules of procedure.

It thus appears (a) that our treaties with China contain no specific provision on the subject of divorce. (b) That the statutes of the United States which have been extended to China are also silent on this subject. (c) That the Common Law in force in China does not embrace the subject of matrimonial causes, and (d) that the Minister has not issued regulations prescribing grounds on which divorce or judicial separation shall be granted.

In view of the foregoing facts, and the rule universally adopted by the Courts of the United States that Courts have no jurisdiction in matrimonial causes except when specifically conferred by statute, we hold that the United States Court for China is without jurisdiction to hear and determine matrimonial causes.

The demurrer is sustained and plaintiff's petition is dismissed with costs.

Signed: L. R. WILFLEY,
*Judge of the United States Court for China.*

## RE PROBATE OF THE WILL OF JOHN PRATT ROBERTS.

*In the United States Court for China.*

*At Shanghai, May, 1907.*

OPINION.

Mrs. Rosalie Adelaide Jackson has filed in this court a document purporting to be the last will and testament of her father, Captain John Pratt Roberts, an American citizen who resided in Shanghai at the date of his death, and she has asked that the same be admitted to probate.

The petition raises the question whether this court has jurisdiction in the matter of the administration of estates of Americans decedent in China. In order to determine this question it will be necessary to inquire into the probate jurisdiction of the American consular courts in China prior to the establishment of this court, because the latter has no jurisdiction that was not possessed by the former.

Section 1 of the Act of June 30, 1906, creating this court, provides that it shall have exclusive jurisdiction in all judicial proceedings whereof jurisdiction may now be exercised by the United States consuls and ministers by law and by virtue of treaties between the United States and China, except in civil cases where the amount involved does not exceed five hundred dollars gold and in criminal cases where the punishment does not exceed a fine of one hundred dollars or sixty days' imprisonment or both. In such cases the consuls retain jurisdiction.

There can be no doubt that China intended by the treaties of extraterritoriality to concede to the United States complete jurisdiction over Americans resident in China, and over their property located in China; and it is equally certain that Congress, by enacting the statute of June 22, 1860, pursuant to the terms of the treaties and for the purpose of carrying the same into full force and effect, meant to extend to China a body of laws adequate to the needs of American citizens resident therein.

The treaty of 1858 provides in Article XXVII as follows:

> All questions in regard to rights whether of property or of person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own Government.

A portion of the Act of Congress of 1860 embodied in Revised Statutes, Section 4085, enacted for the purpose of carrying into full effect the provisions of the treaties, provides in respect to ministers and consuls that

> Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person.

This brings us to a consideration of the question whether Congress extended to China a system of laws relating to the administration of estates which the above named officers were to apply.

The answer to this question is found in the provisions of Revised Statutes, Section 4086, which reads as follows:

> Section 4086. Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall by decrees and regulations which shall have the force of law, supply such defects and deficiencies."

Since neither the general laws of the United States nor the laws relating in particular to extraterritorial jurisdiction contain specific provisions on the administration of estates, and since the minister has issued no regulations on the subject, it follows that the only source from which jurisdiction might be drawn was the common law.

The question now presents itself, was the law of probate of wills and the administration of estates included in the "common law" which was extended to China by the statute?

The term "common law" has been interpreted by this court to mean:

> Those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of transfer of sovereignty, as modified, applied and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States. United States *v.* Biddle, March 6, 1907.

In order to determine whether the law governing the administration of estates was covered by the common law as thus construed it will be necessary to review the history of the law on the subject with a view to ascertaining, first, whether it was a part of the common law of England and the statutes passed in aid thereof, and, if so; second, whether it has been introduced into the United States as the basis of the American law of probate. On account of the meagerness of the library available to the court at the present time our investigation will be mainly confined to accounts contained in the commentaries of Blackstone and Kent, and Judge Woerner's work on "The American Law of Administration." The law governing the administration of estates in England is commonly referred to by text-writers and judges as a part of the ecclesiastical law, which was administered exclusively in the ecclesiastical courts. Though there is warrant in the law for this conclusion by reason of the fact that ecclesiastical courts exercised almost complete jurisdiction over estates of deceased persons for a long period of time in England, yet it will be found upon a close examination of the history of the law that the subject was in fact covered by the common law, that estates were administered in the courts of common law, prior to the establishment of the ecclesiastical courts and that the common-law principles and procedure of the common-law courts appeared in the history of the administration of estates through all the centuries, and have exercised a profound influence on the American law of administration.

> With us in England [says Blackstone] this power of bequeathing is coeval with the first rudiments of the law: for we have no traces of memorials of any time when it did not exist. * * * But we are not to imagine that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal. * * * The shares of the wife and children were called their *reasonable* parts. * * * This continued to be the law of the land at the time of *magna charta.* * * * In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law. * * * In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ,* and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition. Afterwards, the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins, because it was intended by the law that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; * * * And, as he had thus the disposition of intestates' effects, the probate of will of course followed. (Book II, p. 491.)

Continuing in chapter seven of the third book of his commentaries, Blackstone, in discussing the jurisdiction of ecclesiastical courts, says:

> Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature, may seem at first view a little oddly ranked among matters of a spiritual cognizance. And, indeed, they were originally cognizable in the king's courts of common law, viz., the county courts; and afterwards transferred to the jurisdiction of the church by the favour of the crown as a natural consequence of granting to the bishops the administration of intestates' effects. * * * At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer. * * * It appears that the foreign clergy were pretty early ambitious of this branch of power. * * * It fell within the jurisdiction of the spiritual courts by the express words of the charter of King William I, which separated those courts from the temporal. And afterwards, when King Henry I, by his coronation-charter, directed that the goods of an intestate should be divided for the good of his soul, this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This, therefore, we may probably conjecture, was the æra * * * when the king, by the advice of the prelates, and with the consent of the barons, invested the church with this privilege. (Book III, p. 95-7.)

As far as we are able to ascertain, these deductions of Blackstone are based upon the rulings of the courts in the Hensloe Case (Coke's Reports, Part IX, 36 b) and in Snelling's Case (Coke's Reports, Part V, 32 b).

The Court in Snelling's Case held that:

> If the Ordinary took the goods into his possession, he was chargeable by the common law. And the statute of West. cap. 19 was made in affirmance of the common law.

The history of the law, as recited in the Hensloe Case, seems to have met the approval of the annotator of Coke's Reports, who, in commenting upon the same, uses the following language:

> It appears to have been a matter of great controversy, to whom the probate of wills and granting of administration originally belonged, and whether these matters were entirely of ecclesiastical cognizance; the better opinion seems to be that the probate of testaments did not originally belong to the ecclesiastical jurisdiction.

Again he says:

> Wills may be proved, *i. e.*, recorded in any of the courts of common law at Westminster and so likewise in the courts of equity, as the chancery or exchequer; so also in the chamber of the city of London, and divers other cities and towns; and many lordships and manors have an original right of proving wills. And upon the whole it appears, clearly, that the claim and practice of the spiritual courts in this particular was originally a mere usurpation.

This is also the view taken by Professor Stubbs in his work on the Constitutional History of England. He says:

> The whole jurisdiction in questions of marriage was, owing to the sacramental character ascribed to the ordinance of matrimony, throughout Christendom a spiritual jurisdiction. The ecclesiastical jurisdiction in testamentary matters and the administration of the goods of persons dying intestate was peculiar to England and the sister kingdoms, and had its origin, it would appear, in times soon after the Conquest. In Anglo-Saxon times there seems to have been no distinct recognition of the ecclesiastical character of these causes, and even if there had been they would have been tried in the county court. Probate of wills is also in many cases a privilege of manorial courts which have nothing ecclesiastical in their composition, and represent the more ancient moots in which no doubt the wills of the Anglo-Saxons were published. As however the testamentary jurisdiction was regarded by Glanvill as an undisputed right of the church courts, the date of its commencement cannot be put later than the reign of Henry I, and it may possibly be as old as the division of lay and spiritual courts. (Vol. III, p. 344.)

The trust thus vested in the prelates in the course of time, was grossly abused.

> The common law did not make him [the ordinary], being a spiritual governor, subject to temporal suits for such things. And this was a great defect in the common law. (Graybrook v. Fox, 1 Plowd. 275, 277.)
>
> The popish clergy, says Blackstone, took to themselves (under the name of the church and the poor) the whole residue of the estate of the deceased, after the *partes rationabiles*, or two-thirds, of the wife and children were divided, without paying even his debts or other charges thereon. This led to the enactment of the Statute of Westminster II., directing the ordinary to pay the intestate's debts so far as his goods would extend. But even after this check to the exorbitant power of the clergy, whereby the ordinary was made liable to creditors, yet the residuum after payment of debts still remained in their hands, to be applied to whatever purpose his conscience should approve. It was the flagrant abuse of this power that again called for legislative interposition; by the Statute of 31 Edward III, c. 11, the estates of deceased persons were directed to be administered by the next of kin of the deceased, if he left no will, and not by the ordinary or any of his immediate dependants. (Woerner, American Law of Administration, vol. 1, p. 316.)

This statute put the representatives of the estates of intestates upon the same footing with respect to suits and accounting as executors and made them officers of the ordinary. By the statute of 21 Henry VIII, c. 5, the discretion of the ordinary in the appointment of administrators to intestate estates was enlarged, so as to authorize the appointment of either the widow, or the next of kin, or both. The Statutes of Distribution, 22 and 23 Charles II, c. 10, and 29 Charles II, c. 30, made distributable among the widow and next of kin, leaving in the hands of the administrator for his own use the third formerly retained by the church, until finally by the first statute of I James II, c. 17, this third was made distributable, as well as the remainder of the intestate estate. (1 Bradford Surrogate Reports 26; Woerner, American Law of Administration, vol. 1, p. 316; Blackstone, Book II, p. 494, 495).

The powers of the spiritual courts were thus restricted to the judicial cognizance of the class of cases arising out of the probate of wills, the granting of administration and the payment of legacies, and thus remained until, by the statute creating the court of probate, their powers in this respect were wholly abrogated. (20 and 21 Victoria, c. 77).

We have thus traced in brief outline the history of the law of administration of estates in England, wherein it appears that it was a matter cognizable by the common law and in the common law courts until about the period of the Norman Conquest; that thereafter the jurisdiction over the estates of deceased persons was transferred to ecclesiastical courts, proceedings in which, says Blackstone, "were regulated according to the practice of the canon and civil law, or rather according to a mixture of both, corrected and new modelled by their own peculiar usages and interpositions of courts of common law." (Book III, p. 100).

It now becomes necessary to consider how far the principles of the common law thus established and the statutes passed in aid thereof were introduced into the various states of the Union, and became incorporated into the American law of administration.

> *The English law of devise* [says Chancellor Kent] *was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient.* (4 Commentaries 504.)

In discussing the administration of the estates of intestates the same author makes the following comment:

> To avoid repetition and confusion, I shall be obliged to confine myself essentially to the discussion of the leading principles of the English law, and assume them to be the law of the several states, in all those cases in which some material departure from them in essential points cannot be clearly ascertained. * * *
>
> (1) *Of granting administration.* When a person died intestate in the early periods of the English history, his goods went to the king as the general trustee or guardian of the state. This right was afterwards transferred by the crown to the popish clergy; and, we are told, it was so flagrantly abused that Parlia-

> ment was obliged to interfere and take the power of administration entirely from the church and confer it upon those who were disposed to a faithful execution of the trust. *This produced the statutes of 31 Edward III, c. 11, and 21 Henry VIII, c. 5, from which we have copied the law of granting administration in this country.* * * *
>
> Before the Revolution, the power of granting letters testamentary and letters of administration resided in New York, in the colonial governor, as judge of the prerogative court, or court of probates of the colony. It was afterwards vested in the court of probates. (2 Commentaries 408–9.)

The learned chancellor then proceeds to give an account of the development of the probate courts, and the law of administration in New York, and indicates that the same were modelled after and based upon the principles of the common law.

Judge Woerner, in his chapter on the subject of the probate powers as they existed at common law and under the English statutes, uses the following language:

> *The common law of England, as affected by the statutes above named,* (*and others relating to probate,*) *which were enacted before the settlement of the American Colonies, is at the basis of the American statutes concerning administration, and the law in the American States in so far as it has not been supplanted by their own statutes.* (Woerner, American Law of Administration, vol. 1, p. 316.)

He further states that the origin of our probate system, referable to the English spiritual courts, is still recognizable in the decisions of some states as to their mode of procedure, although the rules of the civil and common law which govern the ecclesiastical courts are necessarily greatly modified in the adaptation to widely different circumstances and to the spirit of the American people. In New Hampshire courts of probate "have a very extensive jurisdiction not conferred by statute, but by general reference to the law of the land, that is to that branch of the common law known and acted upon for ages, probate or ecclesiastical law." Morgan v. Dodge, 44 N. H. 255, 258. In California the superior court is by the constitution invested with jurisdiction over probate matters as a part of its general jurisdiction the same as its common-law and equity powers, and is not, therefore, a statutory tribunal, although controlled in the mode of its action by the code. Burris v. Kennedy, 108 Cal. 331, and Heydenfeldt v. Superior Court, 117 Cal. 348.

While American courts of probate may properly be said to be purely creatures of statute at the present time, yet, as Judge Woerner has pointed out, the law administered by them is unquestionably based upon the common law as administered in the Acts of Parliament prior to the date of the transfer of sovereignty. We think there can be no question about the proposition that Congress meant to extend the law of the administration of estates to China under the term "common law" as fully as it meant to extend the law of crimes, which must have been its first consideration in enacting the statutes for the purpose of carrying into force and effect the treaties of extraterritoriality with China.

We hold, therefore, that prior to the inauguration of this court, the consular courts of the United States in China had jurisdiction in the matter of the estates of Americans decedent in China, in all cases, and that now this court has jurisdiction in such matters when the value of the estate involved is above five hundred dollars United States currency, the consular courts retaining their jurisdiction over those estates which are valued at less than this amount.

The will is admitted to probate and letters testamentary will issue forthwith.

Signed: L. R. WILFLEY,
*Judge of the United States Court for China.*

SHANGHAI, *China, May 15, 1907.*

# BOOK REVIEWS

*International Law.* Treatise by L. Oppenheim. Longmans, Green & Co. London and New York. Two volumes: Vol. I, pp. xxxvi, 610; Vol. II, pp. xxxiv, 595.

The student wishing to acquaint himself with the principles of international law as they exist to-day will find his desires met most amply and satisfactorily in these volumes, which, as claimed by the author, are "for students written by a teacher." Himself schooled, as are few other men, in the theories of law, he has little indulged in them save to illustrate his subject. The author's leanings, however, against the positive theory as claimed to be supported by natural sanctions, he does not disguise. To many, his tendencies in this respect will seem to lead to conclusions weakening the compelling forces of the law of nations, regarding, as the author does, its rules, not as resting in the nature of things or in natural right, but as in usages developing into customs which finally for their efficiency rest upon express or implied compact between equals. Such compacts, he finds, for the most part, evidenced by treaties, international practices, and writings of eminent men.

Notwithstanding the author regards the subject from the view-point indicated and makes this manifest, his work is not in any large sense to be considered controversion or polemical. He would rest the foundation of his principles upon a thoroughly jurisprudential basis, which to him gives a veritable positive sanction. The student, however, is informed of the views of those authors who approach the subject differently, and their opinions are fairly analyzed. Summing up somewhat the remarks already made, the reader will readily conclude that his method of reasoning illustrates the inductive rather than the deductive system.

Those who peruse Professor Oppenheim's work will recognize with pleasure its freedom from the deficiencies of temper, when treating of the action of nations other than the English, which disfigure the otherwise admirable volume of Hall.

Professor Oppenheim's first volume is given over to a discussion of the law between nations in times of peace. Commencing with an examination into the foundation of the law of nations, its development and science, he discovers who are international persons, investigates the position of states in the family of nations and their responsibility in general for international delinquencies because of the acts of their official members and of private persons. Before the recent Venezuelan commissions sitting at Caracas, no question was more discussed than that of the responsibility of states for the acts of unsuccessful revolutionists, and, speaking broadly, all the Americans connected with those commissions held that no such responsibility existed, save in the case of proven negligence. It is possible to cite European authors taking the contrary position, but we are pleased to note the following as the language of Oppenheim upon this point:

> The majority of writers maintain correctly the fact that the responsibility of states does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters. Individuals who enter foreign territory must take the risk of the outbreak of insurrection or riots just as the risk of outbreak of other calamities. * * * The state itself never has by international law the duty to pay such damages.

Following the subjects above indicated, Professor Oppenheim discusses the objects of the law of nations treated geographically, including in this methods of physical acquisition or loss. Rules pertaining to the open sea receive due consideration. The position of individuals in international law is analyzed, as we believe, with greater correctness than by the majority of writers on international law. Oppenheim points out what is denied or ignored by many writers — that it is entirely possible for a man to be without recognized citizenship in any country — and has treated, with correctness as we believe, the subject of double citizenship. These topics also received special consideration before the Caracas commissions and the conclusions arrived at were in general accord with those offered by the writer.

Next, the author reviews the powers and position of the organs of the state in its international relations, including the executive, diplomatic envoys, consular representatives, and other agencies. Negotiations, congresses, conferences, and other transactions lead to the concluding head of treaties.

The second volume opens with a discussion of state differences and their settlement either by amicable means or by compulsion short of war. The institution of the Hague Tribunal under the convention of 1899 receives attention, but the specific cases decided by it are not referred to, important as were at least two of them in the history of international law. We refer particularly to the Pious Fund Case, which authoritatively, as we believe, established the sanctity of international arbitral judgments as *res judicata* whenever and wherever they should be invoked; and the Venezuelan preferential question, the correctness of the decision in which case has been and will undoubtedly continue to be the subject of much discussion. The greater part of the volume, however, is devoted to the discussion of the rules of war and of the state of neutrality incidentally created. Differing with a large number of writers, Oppenheim does not apparently consider that a pacific blockade involves in itself an absolute anomaly. In this he has been influenced, it would seem, by the rules laid down by the Institute of International Law and, it may be, by the recent attitude of England, Germany, and finally Italy toward Venezuela. As perhaps is to be expected of a writer influenced, consciously or otherwise, by the English school of thought, Professor Oppenheim is critical of the rule of "due diligence" as laid down by the Alabama arbitrators, although recognizing the three rules of Washington as "the starting point of the movement for the general recognition of the fact that the duty of impartiality obliges neutrals to prevent their states from filling and fitting out, on order of belligerents, vessels intended for warlike purposes." It is interesting to note that, discussing the question of blockade, he differs with some writers, finding no special justification necessary, adding that "the fact is that the detrimental consequences of blockade for neutrals stand in the same category as the many other detrimental consequences of war for neutrals. Neither the one nor the other need be specially justified."

In discussing the subject of contraband, the author, perhaps wisely, does little more than indicate prevailing differences of opinion upon the subject without largely committing himself, although he maintains that states have a right, when going to war, to declare what shall be recognized as contraband. If nations in such position must have, as he says, "a free hand in increasing or restricting * * * the list of articles of absolute contraband," we are unable to give full force to his words when he adds that "the article concerned" must be "by its character primarily and ordinarily destined to be made use of for military or naval purposes."

The text of the work closes with a discussion of the visitation, capture, and trial of neutral vessels. Appendices of the most important English acts and international conventions relating to war, neutrality, and the settlement of disputes are added. JACKSON H. RALSTON.

*Les Deux Conférences de la Paix, 1899 et 1907. Recueil des Textes arrêtés par ces Conférences et de différents Documents complémentaires.* With prefatory note. By Louis Renault, Member of the Institute, Professor of the Law Faculty of the University of Paris and in the School of Political Sciences, delegate from France to both of the conferences. Arthur Rousseau, 14 Rue Soufflot,. Paris, publisher. 1908. pp. 219.

It is peculiarly appropriate that M. Louis Renault should edit for the student, general reader, and man of affairs the various texts of the two Hague conferences, for tradition credits him with a large share in the preparation of the documents formulated by the First Hague Conference, and it is within the personal knowledge of the reviewer that every text adopted by the Second Conference passed under his critical eye, and that not only was each text revised by his hand, but that many of the texts as well as the felicitous preambles were conceived in his own busy brain. M. Bourgeois paid him no idle compliment when he publicly proclaimed him the "Rédacteur-en-chef de la Conférence."

The aim, purpose, and scope of the little volume are so clearly set forth by M. Renault in the prefactory note that it would be ungracious not to yield the floor to him. In translated form it is as follows:

> For use in teaching, I have thought it necessary to gather together the texts adopted by the two peace conferences, as well as the circulars which preceded them. I have added to them the documents which are naturally associated with the work of The Hague, such as the Declaration of Paris, 1856, the Declaration of St. Petersburg, the conventions of Geneva. The collection forms the beginning, and no negligible beginning, of the great work of codifying public international law, undertaken at Paris half a century ago, and which, I do not doubt, will be continued with determination. Doubtless all the acts here brought together are not, at present, expressly accepted by all the states of the world. It can be said that certain countries, for various reasons, have not yet adhered to the Declaration of Paris, although it has the approval given by lapse of time. The powers represented at the last conference have not all signed as yet the conventions which they helped to make; several have wished to profit by the long interval allowed for signature. That has only a passing interest. From the point of view which I take — that is, from the scientific and also political point of view — the work of The Hague, taken as a whole, is henceforth the firm basis of theoretical and practical international law; that is why I have thought it useful to make it easily accessible, not only to students, but to all those who are interested in well-regulated international relations.
>
> The documents at the conclusion of this little volume are of only historic interest; for one, "The instructions of the United States," concerns one country only, and the other, "The project of Brussels of 1874," has never been approved

> by the powers. They have, nevertheless, great importance. The great service which the United States has rendered to the world in initiating a careful regulation of the customs of land warfare must be recognized. The Brussels Conference did not arrive at any immediate result, but it rendered easy the work of codification which the First Peace Conference was able to consummate. It is not uninteresting to compare the solutions given in these various documents.
>
> I have decided to limit myself to texts of an official character; otherwise I would have added the excellent little Manual of the Laws of War, prepared in 1880 by the Institute of International Law, and founded upon the project of Brussels.
>
> I cherish the hope that if anyone takes the trouble to study the texts collected here, which is easy and within the possibility of everyone, instead of glancing merely at the title of the conference, he will agree that the work done at The Hague by the conscientious efforts of the delegates from forty-four countries, if not perfect, is worth more than superficial criticism and condescending irony.

The two Russian circulars of the 12th (24th) August, 1898, and $\frac{\text{30th December, 1898,}}{\text{11th January, 1899,}}$ show that the idea of the conference originated with Russia, and the two American circulars of the 21st of October and the 16th of December, 1904, show as conclusively that the Second Conference originated with the President of the United States, which facts sufficiently and accurately appear in the preamble of the final act of the 29th of July, 1899, and the preamble of the 18th of October, 1907. The little volume can not be too highly recommended, and it is hoped that a work of the same kind may shortly appear in English.

James Brown Scott.

*L'Oeuvre de la deuxième Conférence de la Paix. Exposé juridique et texte des conventions.* By Antoine Ernst, Chief of Division in the Ministery of Justice, secretary of the second plenipotentiary of Belgium at the Second Peace Conference. Misch and Thron, Brussels; Marcel Riviere, Paris; 1908. pp. 175, iii.

The purpose of this little book is entirely different from that of M. Renault. The latter contains the texts of the two conferences; the former the text of the second. The one is prepared primarily for academic use and instruction; the other is meant for the public, more particularly the Belgium public, and aims in a brief but comprehensive introduction of some fifty-four pages to set forth the work actually accomplished by the conference. The Belgium author does not forget the rôle of Belgium, but the secretary of Mr. Van den Heuvel (the second Belgian plenipotentiary) does not overestimate — indeed the reviewer believes that he understates — the value and importance of his brilliant and amiable chief.

The work of the conference is adequately summarized, from the Belgian point of view, be it said, for it is doubtful if the thirty-two nations that voted in favor of a general treaty of obligatory arbitration would subscribe to Mr. Ernst's preference for the special instead of the universal treaty, and some of them would find an inconsistency between a favorable address at the beginning and an adverse vote at the end of the conference on the subject of arbitration..

Again, there are some who might question the propriety of Mr. Ernst's criticism of the recommendation of the court of arbitral justice as a simple *voeu,* for the first commission adopted the project as a *declaration* by the substantial vote of thirty-eight for, three against, and three abstentions. It was the refusal of Belgium, Switzerland, and Roumania to permit the project to figure in the final act unless reduced to the more modest form of a *voeu* that degraded the court project from the high position assigned to it by the overwhelming majority of the conference.

Again, it is questionable if many people would subscribe to the author's list of personalities of the conference, which, while admitting M. Beldiman "le Délégué roumain à l'argumentation précise et serrée," excludes Messrs. Choate and Porter, of the United States, M. Renault, of France, Dr. Kriege, of Germany, Dr. Lammasch, of Austria-Hungary, and Dr. Drago, of the Argentine Republic.

And finally there are not a few who would consider the solemn precedent of the preamble of the final act — namely, the actual proposal of the Second Conference by President Roosevelt — as inconsistent with the gush of the plenary session of September 21, wherein Messrs. Beldiman, M. de Merey, Baron Marschall, *et al.,* affected to consider the initiative of Russia as definitely acquired in the calling of future conferences.

The point of view of the little volume is progressive, *but* Belgian, and if the present reviewer does not share this view-point it is because he is an American, not a Belgian. Honest difference of view does not necessarily imply disrespect or a lack of appreciation.

The texts of the conference are given subject to correction by the official edition, and the volume concludes with a brief but serviceable index.

James Brown Scott.

*Die drahtlose Telegraphie im internen Recht und Völkerrecht.* By Dr. F. Meili, Professor of Private International Law at the University of Zurich. Orell Füssli, Zurich, 1908. pp. 100.

Professor Meili is one of the few contemporary continental internationalists whose writings are familiar also to readers of English. His work on International Civil and Commercial Law has appeared in this country in English form (1905) and he is also known to us through his address on the Hague conferences on private international law delivered at the Universal Congress of Lawyers and Jurists held at St. Louis in 1904.

Dr. Meili admits a predilection for the discussion of the legal problems which modern science has presented in creating new means of transportation and intercommunication. This is all to his credit and is in line with a deeply rooted conviction, noticeable throughout all of the writings of this Swiss authority, that the science of jurisprudence should keep abreast of the progress of the world. As far back as 1871, when telegraphy was yet young, he undertook a scientific investigation of its legal problems. A monograph upon the law of the telephone issued from his pen when the telephone began to be used commercially. His work on the codification of the law relating to automobiles was reviewed in the AMERICAN JOURNAL OF INTERNATIONAL LAW for April, 1907 (p. 554).

His avowed purpose in these treatises is not to digest the substantive law already existing relating to the subjects in hand, for obviously there can be no exhaustive body of law, written or customary, in any country, applicable to legal relations arising from the operation of these modern agencies of commerce. His aim has been rather to analyze and define the juridicial nature of these new agencies and, in this light, to subject the statutory or conventional law already existing on the subject to fair criticism, as a basis for remedying defects and supplying *hiatus* through deliberate legislation.

This object he has well carried out in the present short treatise relating to "wireless" telegraphy, and it is with this in mind that the author discusses the questions, never before so important, of the nature and extent of sovereignty over the air abutting in a vertical plain over the open sea and over the territory of states.

The treatment of the subject is divided into two parts, the first of which deals with the significance of wireless telegraphy from the point of view of the internal law of states; and the second, which is the more important, with its significance in the development of international law. Under the latter head he discusses the contraband nature of wireless messages in time of war, the right of neutrals to maintain wireless telegraphic communication over their territory or upon the high sea, and their duty toward belligerents to suspend or interrupt such communications in a proper case. In speaking for a classification of lines in respect of their neutral or hostile character, he is in accord with another recent writer on this branch of the subject (Scholz, Drahtlose Telegraphie und Neutralität).

The author discusses the two proposed conventions worked out at the Hague conference of 1907 (1) concerning the rights and duties of powers and persons in case of land warfare and (2) concerning the rights and duties of neutral powers in case of maritime warfare. In both of these conventions reference is expressly made to wireless telegraphy, or to use the phrase which will probably be its official designation hereafter, radiotelegraphy.

The author treats also of the international radiotelegraphic convention and the "*engagement additionnel*" entered into at the Berlin conference of 1906, fixing the international operation of the system in times of peace and constituting a union analogous to that already existing as to posts and telegraphs. To both of these the United States Government is a party, though ratifications have not yet been exchanged. The conventions, which are published in full in the Appendix, are to go into operation on the 1st of July next.

The closing remark of the author is sufficiently suggestive to warrant translation and quotation (p. 77):

> The great works of technical discoveries exert an immense influence upon life in the modern world. This fact should constitute a special incentive to the science of jurisprudence to devote attention to modern law equal to that which it devotes to ancient law, particularly to develop the law of intercommunication as a special branch. The agencies of universal intercommunication are, in my opinion, heralds of a universal law, which, in the march of history, will undoubtedly be developed in certain special branches.

The work of Dr. Meili is a timely discussion upon a timely subject. His views are usually broad and progressive, and his analyses may well be recommended to those interested in the study or development of modern international law based upon deliberate conventional legislation.

ARTHUR K. KUHN

*Manuel de la Croix-Rouge.* By Paul Fauchille, Director of the Revue Générale de Droit International Public, and Nicolas Politis, Professor of International Law at the University of Poitiers, with preface by Professor Renault. Paris: Société Française d'Imprimerie et de Librairie, pp. 195.

Those interested in the history, progress, and present state of development of the Red Cross movement, particularly as exemplified by the several Red Cross conventions down to and including that of October, 1907, will find much of value in this brochure, entirely up to date as it is.

After the graceful preface by Professor Renault, the work contains a very valuable historical introduction tracing the Red Cross movement from its origin growing out of the brochure of Henri Dunant entitled "Un Souvenir de Solférino" and the consequent Genevese Society, following with a discussion of the several conferences and conventions to the present time.

The book takes up in its first part charitable assistance in continental wars under general international law and the several conventions, considering in detail the condition of sick and wounded, sanitary personnel, ambulances, hospitals and other sanitary establishments, discussing also the effect of the distinctive Red Cross flag and sign.

In its second part, it considers the question of charitable assistance in maritime wars, including the rights of hospital ships, sanitary personnel, obligations toward sick, wounded, and shipwrecked — all this with special reference, as before, to international law and the conventions relating to the subject-matter. The annexed documents include all the Red Cross conventions of a general character to date.

*Bibliographie du Droit International.* Par le Marquis de Olivart, Associate Member of the Institute of International Law. Two volumes. A. Pedone, Paris. 1st volume 1905; 2nd volume 1907.

These two volumes are the beginning of what should prove a valuable addition to the reference library of international law. Necessarily, the editor has omitted some things, and, necessarily, too, there are errors which must exist in any bibliography attempting to cover so long a period of time, and to be so comprehensive in the field chosen by its editor. A glance at the table of contents will show how extensive is the plan of the work. There are four main divisions — public international law, collections and reviews of international law, private and penal international law, and a division devoted to miscellaneous works, both of a legal and nonlegal character. The first and third divisions are naturally the longer, and the first, especially, gives one the idea of being carefully prepared and compiled from very extensive data. If the third volume of this work, already promised, is as comprehensive as the two issued, which cover approximately five thousand titles of books, monographs, magazine articles, etc., it will bring up to date a very useful and convenient index for the student of international law.

W. Clayton Carpenter.

Among the books not already noted in the Journal we would call to mind the collection of studies of work done at meetings of the Ecole Libre des Sciences Politiques, entitled *Les Questions actuelles de politique étrangère en Europe* (Paris: Alcan. 1907). The collaborators are F. Charmes, A. Leroy-Beaulieu, R. Millet, A. Ribot, A. Vandal, R. de Caix, R. Henry, G. Louis-Jaray, R. Pinon, and A. Tardieu.

The new Geneva conventions are discussed by J. Delpech, in his work, *La nouvelle convention de Geneve pour l'amélioration du sort des blessés et malades dans les armées en campagne* (Paris: Pedone. 1907).

Two interesting Italian works, one on the principle of nationality and one on international legal customs, should be mentioned. *La consuetudine giuridica internazionale. Saggio critico,* by Arrigo Cavaglieri (Padone: Drucker. 1907); and *Verso la politica attuazione del principio di nazionalita,* by M. Arduino (Torino: Vassallo. 1907).

Besides the pamphlet on *Drahtlose Telegraphie* reviewed in this number of the Journal, we would also mention Professor Meili's work, *Moderne Staatsverträge über das internationale Konkursrecht* (Zürich: Orell Füssli. 1907).

Two works in English that are worthy of notice are C. E. Chadman's *A Short Treatise on Public International Law; or the Law of Nations* (Chicago: F. J. Drake. 1907); and *The Law of Private Property in War, with a chapter on Conquest,* by Norman Bentwich (London: Sweet and Maxwell. 1907).

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# STATUS OF ENEMY MERCHANT SHIPS

When no distinction was made in theory and practice between the status of private property of the enemy upon land and upon sea it necessarily followed that such property was liable to seizure and confiscation wherever found. If upon land it would naturally fall prey to an invading army and be appropriated to a public use or claimed as the booty of the commander or camp follower. If the private property of the enemy were within the jurisdiction or control of the other belligerent it could easily be confiscated by actual seizure or legislative enactment. The gradual immunity extended to private property of the enemy upon land, reserving always the right to subject it to requisition or to contribution, creates a distinction between the rights of capture and confiscation unless the principle of immunity be equally extended to unoffending private property of the enemy upon the high seas. As the immunity in the latter case, however acceptable in theory, has not been recognized in practice it follows that, whether logical or illogical, the distinction exists and must be borne in mind in discussing the status of the enemy and enemy property.

It may be stated that international law recognizes as a general principle that private property of the enemy upon land is, within certain limitations, not necessary for the present discussion, exempt from capture and confiscation. It is equally true that private property of the enemy upon the high seas is subject to capture, and the determination of the situation of the property determines at once its liability to or its exemption from capture. An enemy merchant ship is therefore liable to capture if found within the zone of naval operations, unless special rules and regulations exempt it from the treatment recognized and permitted by international law. The situation of the merchant vessel would seem in theory to be unimportant because the right of capture is recognized, but as a matter of fact custom, which is the very life of the law, treats differently property situated in an enemy port at the outbreak of hostilities and private property of the enemy upon the high seas. Therefore, it is advisable, in discussing the general subject, to consider, first, the status of enemy merchant vessels found in port upon the breaking out of hostilities, and, second, to discuss the status of enemy merchant vessels found upon the high seas upon the breaking out of war.

If an enemy merchant vessel moored to the wharf or found within the territorial waters of the other belligerent were regarded not only within the jurisdiction of the belligerent but as thoroughly subject to his jurisdiction as other private property of the enemy found upon the land, there could be in theory no rational distinction between the property and the treatment to be accorded to it. Merchant ships of the enemy are not, however, assimilated to private property upon land, but the tendency of custom is to give to them greater rights and privileges than other property found elsewhere upon the outbreak of hostilities. In former times enemy merchant vessels found in the harbor or within the territorial waters were subject to capture, and when hostilities seemed imminent an embargo was placed upon such property so that departure would be illegal and would subject it to seizure or confiscation. The result would be that upon the outbreak of war the property would be seized and passed before a court as legitimate prize. The older law is briefly stated in the case of Lindo v. Rodney (1781, Douglas, 615), in which Lord Mansfield said:

> Ships not knowing of hostilities come in by mistake; upon the declaration of war or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made.

The policy and reasoning by which it was sought to support seizure and confiscation are set forth in the case of the *Boedes Lust* (1803, 5 C. Robinson, 245), tried and condemned before the great Lord Stowell, then Sir William Scott. A Dutch ship on a voyage from Demerara to Batavia, embargoed at the Cape of Good Hope by a British squadron before the actual declaration of war against Holland in 1803, was afterwards condemned as enemy's property. In passing judgment Lord Stowell said:

> This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconcilation, the seizure would have been converted into a mere civil embargo. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impressed the hostile character upon the original seizure. It is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo*, and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly, the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing.

However artificial, illogical, or unjust we may consider the reasons advanced by Lord Stowell, the case of the *Boedes Lust* was unquestioned law and actual practice. As late as 1854 Dr. Lushington could say:

> With regard to an enemy's property coming to any part of the Kingdom, *or being found there*, being seizable, I confess I am astonished that doubt should exist on the subject. I apprehend the law has been this, that it is competent for any person to take possession of such property, unless it had any protection by license, or by some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it to adjudication. (*Johanna Emilie*, 1854, Spinks, 14).

As Professor John Basset Moore says, in his monumental International Law Digest:

> It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that if war should come they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars.[1]

The innovation came from a quarter in which it was least expected, for on October 4, 1853, Turkey said, in its declaration of war against Russia:

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[1] Moore, Digest of Inter. Law, sec. 1196.

> The Sublime Porte does not consider it just that, agreeable to ancient usage, an embargo should be laid upon Russian merchant vessels. Accordingly, they will be warned to proceed within a period to be fixed hereafter to the Black Sea or to the Mediterranean, as they choose.

The Christian governments did not lag behind the followers of Mahomet, for the Russian Government granted full liberty to Turkish vessels in its ports to return to their destination till the 10th (22d) of November. For example, on March 27, 1854, France issued the following declaration:

> ARTICLE 1. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports and remain there for the completion of their cargoes until the 9th of May, inclusive.

Great Britain issued a similar declaration on March 29, 1854. Further indulgences were afterward allowed to Russian vessels which had sailed for English and French ports prior to May 15, 1854, and Russia on its part allowed English and French vessels six weeks from April 25, 1854, to load their cargoes and sail from Russian ports in the Black Sea, the Sea of Azof, and the Baltic, and six weeks from the opening of navigation to leave the ports of the White Sea.[2]

We thus see that the right of capture and confiscation was recognized in the Crimean war, but following the initiative of the Turkish Government, the great maritime States of Great Britain, France, and Russia, while recognizing the right, limited it in such a way as to free from capture and confiscation enemy merchant ships found in their respective ports and to give them a certain time within which to unload their cargo and proceed to their port of destination. Capture is always a harsh measure, but it seems peculiarly harsh to capture and confiscate merchant vessels whose owners did not or could not know of the outbreak of war and who in no way either directly or remotely influenced or were concerned in the outbreak of war. An enemy vessel found upon the high seas or in an enemy port after such warning or after the various dates prescribed might be treated as having voluntarily assumed the risk of capture, and therefore properly exposed to it. The precedent of 1854 was followed in the Prussian-Austrian war of 1866. For example, the Prussian ministerial declaration, June 21, 1866, provided:

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[2] **Halleck, Inter. Law (3d ed., by Baker), Vol. I, 552, 533, note.**

> Austrian merchant vessels which are now in Prussian ports, or whose masters, unaware of the breaking out of the war, may enter Prussian ports, shall, on condition of reciprocity, have six weeks reckoned from the day of their entry into port to land their cargo and to go away with a new cargo, contraband of war excepted. On the expiration of this term they must leave port. Austrian merchant vessels whose masters are aware of the breaking out of the war are not permitted to enter a Prussian port.[3]

In the great war of 1870 France granted a leave of thirty days, as appears from the following:

> Merchant vessels belonging to the enemy which were actually in the French ports, or which entered the ports in ignorance of the war, were allowed a delay of thirty days for leaving, and safe-conducts were given them to return to their port of despatch or of destination. Vessels which took in cargoes for France, or on French account, in enemies' or neutral ports before the declaration of war, were not subject to capture, but were allowed to disembark their freights in the French ports, and afterwards received safe-conducts to return to their ports of despatch.[4]

These European precedents were followed by the United States in the Spanish-American war of 1898. In the President's proclamation, dated April 25, 1898, for the government of the officers of the United States during the war with Spain the fourth rule read as follows:

> 4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided,* That nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for

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[3] Moore, Inter. Law Digest, sec. 1196.

[4] Halleck, Inter. Law (3d ed., by Baker), Vol. I, 532, note.

their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.

The Spanish Government issued a royal decree, dated April 23, 1898, which permitted, five days from the date of publication, the departure of American ships from Spanish ports. It was not so liberal as the American proclamation, for the Spanish decree did not in terms prohibit the capture of the American merchantmen after their departure nor did it provide for the entrance and discharge of American ships sailing for Spanish ports before the war. As no captures were made by Spain, the exact nature and extent of the immunity were not tested before a prize court. The President's proclamation, however, was passed upon by the courts of the United States, and the interpretation thereof was liberal, in accordance with its spirit. The leading case on the subject is the *Buena Ventura* (1899, 175 U. S., 384). The vessel in question was a Spanish merchant ship captured on the morning of April 22, 1898, some eight or nine miles off the Florida coast. At the time of capture the vessel was on a voyage from Ship Island, Mississippi, to Rotterdam, by way of Norfolk, Va., with a cargo of lumber. She arrived at Ship Island March 31, 1898, and sailed for Rotterdam April 19, with a permit, obtained in accordance with the laws of the United States, to call at Norfolk for supply of bunker coal. When captured on April 22 she made no resistance, had on board no military or naval officer, and carried no arms or munitions of war. The question at issue was therefore whether the vessel could be brought within the exemption of the fourth rule of the proclamation of 1898 as to "Spanish merchant vessels, in any ports or places within the United States." In delivering the opinion of the Supreme Court, Mr. Justice Peckham observed, to quote the language of Professor Moore —[5]

> that the vessel in question, as a merchant vessel of the enemy carrying on an innocent commercial enterprise at or just prior to the time when hostilities began, belonged to a class which the United States had always desired to treat with great liberality, and which civilized nations had in their later practice in fact so treated. The President's proclamation

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[5] Digest of Inter. Law, sec. 1196.

should therefore receive "the most liberal and extensive interpretation" of which it was capable, and where two or more interpretations were possible the one most favorable to the belligerent in favor of whom the proclamation was issued. The provision that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing" might, said the learned justice, be held to include (1) only vessels in port on the day when the proclamation was issued, namely, April 26, or (2) those in port on April 21, the day on which war was declared by Congress to have begun, or (3) not only those then in port, but also any that had sailed therefrom on or before May 21, whether before or after the commencement of the war or the issuing of the proclamation. The court adopted the last interpretation. While the proclamation did not in so many words include vessels which had sailed from the United States before the commencement of the war, such vessels were, said Mr. Justice Peckham, clearly within its "intention," under the liberal construction which the court felt bound to give it. In view of the fact, however, that at the time of the capture the proclamation of April 25, without which the vessel would have been liable to condemnation, had not been issued restitution was awarded without damages or costs.

The recent Russo-Japanese war likewise followed the enlightened practice dating from the Crimean war. For example, the Imperial Japanese ordinance of February 9, 1904, provided that —

> ARTICLE 1. Russian merchant ships which happen to be moored in any Japanese port at the time of the issue of the present rules may discharge or load their cargo and leave the country not later than February 16.
>
> ART. 2. Russian merchant ships which have left Japan in accordance with the foregoing article and which are provided with a special certificate from the Japanese authorities shall not be captured if they can prove that they are steaming back direct to the nearest Russian port, or a leased port, or to their original destination; this measure shall, however, not apply in case such Russian merchant ships have once touched at a Russian port or a leased port.

And the Imperial Russian order of February 14, 1904, provided that —

> Japanese trading vessels which were in Russian ports or havens at the time of the declaration of the war are authorized to remain in such ports before putting out to sea with goods which do not constitute articles of contraband during the delay required in proportion to the cargo of the vessel, but which in any case must not exceed forty-eight hours from the time of the publication of the present declaration by the local authorities.

It is thus seen that in no less than five great wars of the last fifty years an exemption is made in favor of enemy merchant vessels in port at the outbreak of hostilities, and that a longer or shorter period is fixed within which such vessels may safely leave their ports and proceed to their destination. Although the custom is modern, it can not be said to be limited to any particular quarter of the world; for the states generally have recognized the exemption in their recent wars, not only in Europe and America, but also in Asia. Such a custom, however recent it may be, may rightly claim to form a part of the law of nations. It is therefore a source of regret that the Second Peace Conference refused to recognize it as a right but simply as a privilege, a *délai de faveur,* which may be accorded or refused at the option of the belligerent, and that the privilege was unaccompanied by any recommendation of a period of time within which the privilege in question should be accorded. The exact wording of the first two articles of the convention follows:

> ARTICLE 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.
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> The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.
>
> ART. 2. A merchant ship unable, owing to circumstances of *force majeure,* to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.
>
> The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

It may be said that the expression "it is desirable" that the vessels should be allowed to depart freely amounts in reality to a command, and that the practice of the future will recognize the custom as freely as it has done in the past, thus establishing as a right what the conference modestly denominates a privilege. If such be the case the opposition of Great Britain to the recognition of the right will be as futile in practice as it was unreasonable at the conference.

Passing to the second branch of the question, namely, the treatment accorded to enemy merchant ships which prior to the outbreak of war had left port destined to any port or place of the other belligerent, the enlightened policy of the European states in their recent wars of 1854, 1866, and 1870, has been stated in the extracts already quoted from their respective declarations. The more recent practice will be briefly set forth. The fifth rule of the Presidential proclamation of April 26, 1898, provided:

> 5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

It has previously been observed that the Spanish decree did not provide for the entrance and discharge of American ships sailing for Spanish ports before the war, but, as no captures were made by Spain, the less liberal provisions of the Spanish decree did not affect American commerce. Rule 5 of the American proclamation was judicially interpreted in the case of the *Pedro* (175 U. S., 354). This vessel, sailing under the Spanish flag and officered and manned by Spaniards, was loaded in Antwerp for Cuba; and on March 18, 1898, was chartered by an American firm to proceed to Pensacola, Fla., or Ship Island, Miss., for a cargo of lumber for Rotterdam or Antwerp. Shortly after this date the *Pedro* sailed from Antwerp with a cargo of merchandise for Havana and Cienfuegos. She arrived at Havana on April 27 and, after discharging her cargo, sailed on the 22d for Santiago, Cuba, with a small quantity of general merchandise taken at Havana. While pursuing the voyage from Havana to Santiago, Cuba, she was captured on the same day, April 22, a few miles from Havana by the United States blockading fleet. In delivering the opinion of the Supreme Court, Chief Justice Fuller held that the *Pedro* did not fall within the exemption contained in rule 5; that she lay at Havana from the 17th of April to the 22d;

that she cleared from Havana April 22, a day after the war began; that she had then no cargo for any port of the United States, but only for an enemy port, namely, Santiago and Cienfuegos. It could not therefore be said that she had left a foreign port in ignorance of the "perilous condition of affairs;" that it must be assumed that she either knew of hostilities or had been advised that hostilities were imminent. She was not bringing a cargo to the United States for the increase of its resources and the convenience of its citizens, but she was an enemy vessel trading with an enemy port. The Supreme Court therefore affirmed the condemnation of the District Court and held squarely that the contract to proceed ultimately to a port of the United States did not bring the vessel within the exemption of the fifth rule. While the decision of the Supreme Court is technically correct, it would seem that it was illiberal both in its interpretation and application of the exemption meant to be conferend by the fifth rule, as was pointed out by Mr. Justice White in a strong dissenting opinion, in which Justices Brewer, Shiras, and Peckham concurred. While it is true that a statute in derogation of the common law should be strictly construed, this principle clearly should not apply to an exception in the common law of nations made in the interest of innocent enemy subjects engaged in innocent commerce.

In the recent Russo-Japanese war an indemnity of a like nature was extended by article 3 of the Imperial Japanese ordinance of February 9, 1904, the exact text of which is as follows:

> Russian steamers which may have left for a Japanese port before February 16 may enter our ports, discharge their cargoes at once, and leave the country. The Russian steamers coming under the above category shall be treated in accordance with article 2 [previously quoted].

It will be seen, therefore, that recent enlightened practice permits enemy merchant ships which have left their last port of departure before the commencement of the war, or within a certain fixed period, to continue their journey unmolested to the port or place within the territory of the other belligerent, to unload their cargoes and to return to the home port without danger of capture during the voyage. The convention concerning the status of enemy merchant ships unfortunately is less liberal than recent practice. Article 3 is as follows:

> Enemy merchant ships which left their last port of departure before the commencement of the war and are encountered on the high seas while still ignorant of the outbreak of hostilities can not be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board, as well as the security of the ship's papers.
>
> After touching at a port in their own country, or at a neutral port, these ships are subject to the laws and customs of maritime war.

The seeming exemption is rather illusory, for the exemption from capture is based upon the fact that at the time of seizure the enemy merchant ships were still ignorant of the outbreak of hostilities. If they had been informed of the existence of hostilities they would seem to be liable to capture, for the merchant vessels of to-day have discarded canvas for steam, and it rarely happens that a vessel is provided on the outbound voyage with sufficient coal for the return. It would seem, therefore, that the vessel is exposed to capture because it could not safely continue its voyage to the belligerent port, and, if it seeks to return to the home port, the vessel is liable to capture, with little chance of escape by reason of the lack of means to continue its voyage. If the merchant vessel is ignorant of the outbreak of hostilities it may not be captured, but it may be detained subject to restoration at the end of the war without compensation. The value of the vessel may be seriously depreciated in case of a long war. If requisitioned, it is unlikely that the transaction will be profitable to the original owner, and if destroyed it is improbable that the compensation will at all be adequate. The article in question, therefore, can not be considered an advance; it is a distinct limitation of customary rights. Article 4 of the convention is as follows:

> Enemy cargo on board the vessels referred to in articles 1 and 2 is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.
>
> The same rule applies in the case of cargo on board the vessels referred to in article 3.

The provisions depending upon articles 1 and 3, already quoted, would seem to require no special explanation or comment.

The convention as a whole was a compromise between those who believed in the existence of a right and those who refused to recognize the legal validity of the custom which has grown up in recent years. As in most compromises the result is unsatisfactory. The convention can not be called progressive, for it questions a custom which seems generally established and its adoption would seem to sanction less liberal and enlightened practice. The United States delegation therefore refused to sign the convention and its acceptance has not been recommended by the Department of State.

James Brown Scott.

# CONVERSION OF MERCHANT SHIPS INTO WAR SHIPS

The seventh of the Hague conventions bears the title, " Convention relative à la Transformation dès Navires de Commerce en Bâtiments de Guerre." The convention really relates to vessels which *have already been converted* into war ships rather than to their conversion. The articles bearing on the subject are as follows:

### ARTICLE 1.

A merchant ship converted into a war ship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

### ARTICLE 2.

Merchant ships converted into war ships must bear the external marks which distinguish the war ships of their nationality.

### ARTICLE 3.

The commander must be in the service of the state and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

### ARTICLE 4.

The crew must be subject to military discipline.

### ARTICLE 5.

Every merchant ship converted into a war ship must observe in its operations the laws and customs of war.

### ARTICLE 6.

A belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of war ships.

### ARTICLE 7.

The provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention.

These articles provide that war status will be conceded to merchant vessels only when under state authority, bearing the flag and distinguishing marks of belligerent nationality, subject to the command of a duly commissioned officer, with crew under military discipline, and observing the rules of war.

These articles take the converted merchant vessel out of the category of privateers and thus respect the first clause of the Declaration of Paris of 1856 by which "privateering is and remains abolished." The converted merchant vessels become a part of the navy.

This had already been provided for in the Regulations for the Naval Auxiliary Service of the United States in effect April 1, 1907. In Chapter I, 2, of these regulations it is provided that "these vessels shall be governed by the laws of the United States, by the Navy regulations as far as they may be applicable, and by these regulations."

This seventh convention provides for the responsible control of merchant vessels converted into war vessels. It is accepted as a general proposition that a belligerent under proper regulations will be allowed to use his resources upon the sea as well as upon the land. The fundamental objection to the use of converted merchant vessels has previously been the lack of government control and responsibility. Such control and responsibility is now secured. This convention might properly have the title, "A Convention to Secure the Observance of the Declaration of Paris in regard to Privateering."

According to the preamble itself of the seventh convention, it does not make provision for the subject proposed in the program of the Czar, viz., "conversion of merchant vessels into war ships." The preamble of the convention is as follows:

> Whereas it is desirable, in view of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected;
>
> Whereas, however, the contracting powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a war ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules.

The more important naval powers have agreements with the steamship companies under which in time of need certain vessels may be taken into the public service.

The place of conversion is a matter of utmost importance, and this subject by specific declaration remains outside the convention.

In general, a merchant vessel might be converted into a war vessel in a home port, on the high sea, or in a neutral port, and under exceptional circumstances within the jurisdiction of the other belligerent.

To conversion in a home port, followed by prompt notification as provided for in article 6 of the convention, little objection could be raised.

In the exceptional case of conversion within an enemy's jurisdiction there might arise a question of the exercise of good faith if a merchant vessel should forthwith be converted into a war vessel after it had been allowed to take on cargo or make repairs in an enemy's port during the days of grace allowed for departure of enemy vessels at the outbreak of war. It would seem that a regulation should be adopted by which vessels allowed such a privilege should retain their merchant character, at least until converted in a home port.

The main questions arise, however, in regard to conversion on the high seas, which the convention excludes because the powers can not reach an agreement, and conversion within neutral jurisdiction, which the convention does not mention.

The discussion during the Russo-Japanese war in regard to the conversion of the *Smolensk* and *Peterburg* of the Russian volunteer fleet after they had passed the Dardanelles, closed to war vessels, and were upon the open sea is too recent to need review. It showed the necessity of some international understanding in order to avoid friction. There is no provision at present which prevents change of character from time to time from merchant to war ship or *vice versâ*, unless it be article 6 of the convention, which provides that "a belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of war ships." It would seem that to render this article 6 definite there should be an additional clause to the effect that a vessel thus placed in the list of war ships should retain this status to the end of the war, as some of the delegates contended.

A neutral state has a right to demand that the status of a vessel be not changed from that of a merchant vessel to that of a war vessel in such manner as to render the preservation of neutrality unnecessarily difficult. It is evident that questions as to the observance of neutrality might arise if a merchant vessel should enter a neutral port and load with supplies which would render the vessel of immediate service in war and after taking on such supplies assume a war status. What a war vessel in time of war may do in a neutral port is usually strictly prescribed. It may remain only for a specified period, take on a specified amount of coal, etc. A merchant vessel has almost unlimited freedom so long at it observes ordinary port regulations. If a merchant vessel may change to a war vessel immediately after leaving the neutral port or even within the port, a neutral may unwittingly allow such a vessel to prepare within the neutral jurisdiction to prey on the neutral's own commerce. A neutral port might become practically an enemy's base. Many contingencies might arise which would emphasize the need of the provisions which the seventh convention did not cover though recognized as desirable and considered to some extent by the delegates.

This convention embodies and makes more definite the principles which have been generally followed in practice since 1870, when Germany made her propositions in regard to a voluntary naval force. It regulates somewhat more carefully the use of such vessels after they are enrolled in the public forces. Many questions arose at the Hague conference of 1907 which made impossible the formulation of generally acceptable rules on all points in regard to the conversion of merchant ships into war ships. Some of the delegates were absolutely opposed to conversion except in a home port. While some of the delegates were generally opposed to conversion on the high seas, they wished to make exceptions in favor of merchant vessels which had left national ports before the outbreak of hostilities and in favor of the conversion of merchant vessels captured from the enemy on the high sea and adapted to warlike use. Some thought that the abolition of capture of private property at sea would lead a belligerent to change a ship from a war status to a merchant status if in danger of capture in order to bring it under the exemption. Great freedom of conversion and reconversion was favored by a few of the delegates. The need that the character of a vessel be clear to a neutral was generally maintained.

Upon the question justly regarded as the most difficult, "the question whether the conversion of a merchant ship into a war ship may take place upon the high seas," the contracting powers have been unable to come to an agreement. As the preamble of the seventh convention states, "the question of the place where such conversion is effected remains outside of the scope of this agreement" and is in no way affected by its rules. Thus, it is evident that while provision is made for the abolition of the evils of privateering, there remains for a later conference the agreement upon such difficult questions as those of conditions under which a converted vessel may be reconverted into a war vessel and the place where conversion and reconversion may be allowed.

GEORGE GRAFTON WILSON.

# THE USE OF SUBMARINE MINES AND TORPEDOES IN TIME OF WAR

This subject, which was brought so forcibly to the attention of the civilized world by the operations of the Russo-Japanese war in the vicinity of Port Arthur, was one of the questions at the Hague conference last year, being thus brought for the first time to the attention of an international conference.

In making this statement I do not ignore the fact that the Institute of International Law had previously discussed this question and formulated some ideas upon the matter, but this Institute, no matter how valuable its academic discussions may be, is in no sense an authoritative organization or, in the proper and official sense, an international conference.

When the invitation, however, was formally given by the Russian Government for the Second Peace Conference at The Hague the question of submarine mines was among those duly enumerated in the official program of the conference. Its bearing upon the free navigation of the seas and upon the safety of those being carried thereupon brought the matter within the scope of the rights of neutrals as well as within the domain of common humanity.

It may be well to state that the floating means of defense and offense referred to in this article can be differentiated into three classes:

1. Automobile torpedoes, which are projected both from shore stations and from vessels of various sizes against the vessels of the enemy in the course of a naval action.

2. Submarine mines which float in water-tight cases and are anchored along the coasts and in and off harbors, and which are generally exploded at will from shore by electrical apparatus and cables.

3. Submarine mines which are floating, either anchored or drifting, whose explosion is caused automatically by contact.

This latter type can be placed rapidly in large numbers and the mines are intended to be exploded by a simple shock arising from the contact with an enemy's vessel. It is this type which is so dangerous to friend as well as to foe, and submarine mines of this class were especially the subject of the discussion at The Hague. Such floating contact mines, when beyond the control of the belligerent using them, or which have broken adrift from their moorings, carry great danger with them on the high seas to neutral and pacific commerce and lives. This sea area should be free and open to all nations and its liberty has been definitely established by common consent and the law of nations for centuries. In this way, directly and indirectly, has arisen a conflict between the new conditions of sea warfare and national defense and the principles of the freedom of the seas. No subject assigned to the Hague conference seems to have required a settlement and reconciliation more than this one, with its two varying requirements. The dangers arising from the use of these automatic contact submarine mines are not of an imaginary nature. In the operations about the Liaotung Peninsula, previously referred to, the fatalities from such mines not only extended to a great distance from the actual scene of operations, but in time outlasted these operations and also the duration of the war.

The delegation representing China at The Hague stated that at the time they addressed the conference upon the subject their country was still obliged to furnish their coasting vessels with apparatus to raise and destroy floating mines, which were found in quantities both in the open sea and in their own territorial waters. Notwithstanding all of the care taken in this respect, a very considerable number of merchant vessels, fishing boats, junks, and sampans had been sunk, and between five and six hundred of their countrymen, while innocently and peaceably employed, had cruelly lost their lives from this cause alone.

It will, however, have to be considered that submarine mines constitute not only an effective but a comparatively inexpensive means of defense for nations possessing extensive coast lines and small navies as against great naval powers. This system of maritime defense appeals in consequence to the less powerful countries as a ready and economical defense against arbitrary naval strength, and considering, therefore, the fact that in the Hague conference of 1907 the membership was mostly held by weak naval powers it is not to be wondered that considerable opposition and conservatism was shown with respect to the propositions of Great Britain as a representative of great maritime power. On the other hand, the Colombian proposition to restrict the use of submarine contact mines for defensive purposes alone naturally came more nearly within the range of success. It is very probable that if it were possible to differentiate exactly between offensive and defensive operations of this nature the employment of such mines would have been so restricted. The endeavor to substitute for submarine contact mines those exploded only at will by means of electricity met with failure also, both on account of the want of readiness in the placing of such mines and the restricted distance from the shore at which such mines could be effectively used. Vessels of the enemy lying beyond their placement could easily, with the range of modern weapons, destroy or injure by gun fire in safety the shipping, resources, and defenses of the ports under attack.

The delegation from Great Britain was apparently the only one ready with a definite project formulated for discussion at the beginning of the conference. What might be called amendments to the British proposition or to its several articles were presented by Italy, Japan, Holland, Brazil, Spain, Germany, Russia, and the United States. A formal proposition on the part of the United States was offered at the session of the subcommission on the 11th of July, too late to be printed, distributed, and discussed by that subcommission before its reference to the preliminary committee of examination and drafting. Consequently, it appears as an amendment to the British proposition and is given further on.

It is to be regretted that better preparations generally were not made before the assembling of the conference, and the following suggestions of Dr. Lawrence, the well-known English publicist, should be considered before the next meeting of the Hague or any similar conference. These suggestions are that:

1. Any power or groups of powers to be represented at the next conference shall have the right of proposing subjects for discussion.
2. Such proposals shall take the form of draft articles for an international code, and shall be sent to the International Bureau at The Hague at least six months before the date fixed for the assembling of the next conference.
3. Five months before that date the proposals received shall be communicated in a classified and digested form by the International Bureau to the governments of all the powers who are to take part in the conference.
4. Three months before that date any amendments which any power or group of powers may desire to bring forward shall be sent to the International Bureau.
5. Two months before that date the International Bureau shall communicate to the powers the proposals and amendments duly classified and arranged under appropriate headings.
6. As soon as the conference assembles it shall elect a small committee, which shall have power to fix the order of discussion and to admit any new subject for which at least three powers demand emergency.

Before mentioning the purport of the British propositions which were taken as the foundation of the discussion it may be well to state that Great Britain has practically abandoned the use of submarine mines for the defense of its ports and is trusting to projected automobile torpedoes of the Whitehead and other types in connection with submarine boats for the defense of its seaports. Hence, and in connection with this, the fact that her fleet, both naval and maritime, is the greatest in the world — never greater or more efficient than now — this Power represents the extreme school against the use of submarine mines exploded by contact. The British propositions stated concisely are:

1. That the use of all submarine mines exploded automatically by contact and not anchored should be forbidden.
2. That any such mines anchored that do not become harmless upon breaking adrift should also be forbidden.
3. That the use of floating contact mines to establish or maintain a commercial blockade should be forbidden.
4. That such contact mines should only be anchored and established within the territorial waters of the belligerents except in case of operations against military or naval ports.

In addition, it was proposed that all contact mines should be so constructed that after a certain period they would become harmless, and also that after the war was over both belligerents should mutually work together to remove or destroy all mines remaining in their territorial waters.

The proposition of the United States was:

1. Unanchored automatic contact mines are prohibited.
2. Anchored automatic contact mines which do not become innocuous on getting adrift are prohibited.
3. If anchored automatic contact mines are used within belligerent jurisdiction or within the area of immediate belligerent activities, due precautions shall be taken for the safety of neutrals.

The leading power in opposition to the British proposition seems to have been Germany, aided in some of the final votes by France. The German propositions or amendments had a tendency to lessen the cogency of the articles as proposed at the earlier commissions, and from their vague nature would have tended to lessen the effectiveness of the rule and to widen the sphere of the use of submarine mines of all kinds. A reservation was made by Germany in the final vote upon article 2 which forbids the placing of automatic mines of contact before the coasts and forts of the adversary with the sole purpose of intercepting commercial shipping. Although the failure to vote favorably for this proposition was explained by Baron Marschall de Bieberstein on account of the use of the word "seal" and the introduction of a subjective element or an evasion, an impression has been formed, probably unjustly, that Germany, from its action here and upon other propositions, looked favorably upon a commercial blockade of an enemy's port by submarine mines alone. This, of course, would be in contravention of the Declaration of Paris and mark a retrogression in maritime warfare.

The rules as finally adopted by the full conference follow, with a brief statement of the votes upon each rule or article. I follow generally the English translation of the articles as officially published, the American text not having come to hand in time for this article:

### ARTICLE 1.

It is forbidden:

1. To lay unanchored submarine mines, except when they are so constructed as to become harmless one hour at most after they have escaped from the control of the person who laid them;

2. To lay anchored submarine mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

As to this article, Germany, which had previously reserved its vote with respect to the first paragraph in the full conference and final vote, withdrew its reserve and accepted the paragraph as it stood.

The Turkish delegation was not ready to accept the article and enter into an engagement because the systems of rendering mines harmless were not universally known.

Russia and Siam accepted the article with a reserve as to the first paragraph.

### ARTICLE 2.

It is forbidden to lay submarine mines off the coast and ports of the enemy, with the sole object of interrupting commercial navigation.

Upon this article Germany and France reserved their vote on account of possibility of evasion.

### ARTICLE 3.

When anchored submarine mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to see, in as far as it is possible, that these mines become harmless within a certain interval, and in case they should cease to be looked after, to notify, as soon as military exigencies permit, those engaged in navigation, and the governments through the diplomatic channel, of the danger zones.

To this article the only dissenting voice was that of Turkey. The Turkish delegate stated that in view of the exceptional situation created by treaties now in force with regard to the Dardanelles and the Bosphorus, straits which are integral parts of its territory, the Turkish Government would not assume any engagement whatever that would restrict the means of defense that it might judge to be necessary for these straits in case of war, or for the purpose of causing respect for their neutrality.

### ARTICLE 4.

Neutral powers which lay submarine mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral powers must inform shipowners, by a notice issued in advance, where submarine mines have been laid. This notice must be communicated at once to the governments through the diplomatic channel.

### ARTICLE 5.

At the close of the war, the contracting powers undertake to do their utmost to remove the mines which they have laid, each one removing those which it has laid.

As regards anchored submarine mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the power which laid them, and each power must proceed with the least possible delay to remove the mines in its own waters.

### ARTICLE 6.

The contracting powers which have not yet perfected mines such as the present convention has in view, and which, consequently, could not at present carry out the rules laid down in articles 1 and 3, undertake to transform these mines as soon as possible, so as to bring them into conformity with the foregoing requirements.

The Turkish delegation repeated their inability to undertake any engagement for the present with respect to the transformation of mines required by article 6.

The provisions of the present convention are concluded for a period of seven years or until the end of the Third Peace Conference, if that date is earlier.

The contracting powers engage themselves to reopen the question of the employment of the automatic contact submarine mines six months before the expiration of the period of seven years or in case where it has not been reopened and settled by the Third Peace Conference at an earlier date.

Failing the arrangement of a new convention, the present rules will continue to remain in force, except by denunciation of the present convention. The denunciation will not be effective (with respect to the power which has notified) until six months after the notification.

The Spanish delegation gave its vote to the project, but with regrets that it was insufficient and did not answer entirely to the wish of their Government. In voting for the project as a whole, it was adopted by the conference unanimously, excepting the reserve relative to paragraph 1 of article 1 made by the delegations of the Dominican Republic, Mexico, Montenegro, Russia, and Siam, and that of Turkey relative to the whole article. Also excepting the reserves made relative to article 2 by Germany and France, and Turkey with respect to articles 3 and 6.

### CONCLUSIONS

The first article seems to be clear and intelligible in its phrasing and to be the best thing possible under the circumstances. It was stated by experts present that it had been demonstrated by experiment that the drifting mines referred to in the first two paragraphs of this article could be rendered harmless in the times mentioned. One method was by making a hole in the case of the mine and filling it with a soluble substance like sal ammonia, which in a certain time would drown the charge and sink the mine. Another method proposed the same effect by galvanic action. Automobile torpedoes of the present day are so arranged as to follow the conditions of the third paragraph, so no novelty is here prescribed.

The second article has been criticised both by British and German authorities as capable of allowing an evasion or using some pretext that may come within the inventive ingenuity of the commanding naval officer. The principle to my mind is well established by the wording of the article; its violation would be a very serious matter, involving as it would, in all probability, more danger to neutrals than to belligerents. I must confess that I think the high sense of honor to be expected from the naval officer in command in such case would not be wanting in any civilized naval force. The English proposition upon this subject has been given elsewhere.

In article 4 for the first time is recognition of the right of neutral powers to use submarine mines for the purpose of defending their neutrality. It is a right that comes within that of self-preservation, which has naturally included heretofore the right to use force by other means and on the surface to maintain the neutrality of their territory and the control of their waters.

The general principles enunciated in articles 3, 4, and 5 met with practically no objection except from Turkey concerning the Bosphorus and the Dardanelles. Article 6 has been criticised because it is not sufficiently definite and limited in the period providing for the transformation of mines in conformity with the rules laid down in articles 1 and 3. It seems to border upon the hypercritical to complain of this, for with varying budgets and technical skill and resources it appeared to be almost impossible to bind the nations to a fixed time. The governing principle being agreed upon, it is not very likely to be ignored and mines of the old pattern used if there is sufficient interval allowed before the next naval war.

The rules as given above and adopted do not go as far as the United States and many other powers, including Great Britain, desired, but the half loaf is certainly better than no loaf at all. By the next conference it is hoped that the safety of the high seas will be provided for in a more effective and comprehensive manner than the rules which were finally formulated. It is, however, a beginning, but, in the words of Sir Ernest Satow, a British delegate, this arrangement can not be considered as giving a definite solution to the question. It is something where nothing before existed, and at least a milestone on the way to a more complete correction of the evils with which it deals.

C. H. STOCKTON.

# BOMBARDMENT BY NAVAL FORCES.

Among the six voeux to be found in the final act of the First Hague Peace Conference is the following:

> The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration.

This recommendation did not fall upon deaf ears, and among the most admirable results of the Second Peace Conference is the small but simple convention forbidding the bombardment of undefended ports, towns, villages, dwellings, or buildings. This is not the appropriate place to discuss the relation between a recommendation of one conference and the work of a succeeding one, but it is pleasing to note that the recommendation of a conference is not a burial; that it calls attention of the powers to the subject-matter and thus paves the way for a substantial agreement at the conference to which the recommendation is referred. If the recommendations of the Second Conference fare as well as the recommendation of the First Conference regarding bombardment, the world will be the gainer and the cause of international justice, and therefore of peace, will be much advanced by the Third Conference, which is gradually becoming the center of hope and expectation.

The purpose of war is to bring the enemy to terms, and any means calculated to attain this desirable end are legitimate, provided they do not cause needless suffering and are not in their nature more brutal than war must always be. The noncombatant is regarded merely as a prospective enemy, to be looked upon with suspicion but not to be subjected to the pains and penalties of the soldier in the field. Public property may indeed be appropriated; private property may be destroyed for a military purpose, may be requisitioned, or may be subjected to contribution, but it is no longer at the mercy of an enemy or invader. A fortress may be assaulted, but the garrison is no longer put to the sword for a refusal to surrender. A fortified town may be taken by storm, but the noncombatant and his property must be spared, so far as possible. Article 25 of the regulations respecting the laws and customs of war on land adopted at the First Hague Conference provides that the "attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited." The enemy, his means of attack and defense, may be reduced by force. The defenseless, whether they be noncombatants or merely property, are no longer exposed to attack or destruction. It is true that this article and its salutory prohibition applies to land warfare, and the attempt to extend it to naval warfare failed for the moment because Great Britain was unwilling to extend the discussion beyond the immediate program — namely, the codification of the laws and customs of warfare on land — hence the reference to a subsequent conference. There is, however, no reason why a different rule should prevail in naval warfare and that nonoffending and defenseless towns, villages, or habitations should be destroyed merely because the assailant is able to do so. Devastation in land warfare has not produced peace. It has, on the contrary, prolonged war and created an animosity which survives the war in which it occurred. It is not only brutal but useless as well. As long ago as 1694 Evelyn said:

> Lord Berkeley burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of destructive war was begun by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.[1]

Devastation of the coast, whether it be produced by land forces or by the enemy at sea, is still devastation and there is no reason to believe that the effect upon the enemy will be different merely because the devastation is the result of bombardment rather than the result of fire and sword by land.

> When the Prince de Joinville recommended in 1844, in case of war, the devastation of the great commercial towns of England, the Duke of Wellington wrote: "What but the inordinate desire of popularity could

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[1] Hall, International Law, 5th ed., 533, note 2.

> have induced a man in his station to write and publish such a production, an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilized portions of mankind.[2]

But, rejected by the Duke of Wellington, the opinion of the Prince de Joinville was recently espoused by Admiral Aube, a French naval officer, in an article in the Revue des Deux Mondes,[3] where he argued that the purpose of war is to inflict the greatest possible damage to the enemy and that —

> As wealth is the sinews of war, all that strikes at the wealth of the enemy — *a fortiori* all that strikes at the source of wealth — becomes not only legitimate but obligatory. It must therefore be expected that the fleets, mistresses of the sea, will turn their powers of attack and destruction, instead of letting the enemy escape from blows, against all the cities of the coast, fortified or not, peaceful or warlike, to burn them, to ruin them, and at least to ransom them without mercy. This was the former practice; it ceased; it will prevail again. Strasbourg and Péronne assure it.[4]

This relapse into barbarism was like a bolt in a clear sky, because there were very few examples of the bombardments of undefended coast line and these precedents were universally discredited. The only recent example of the bombardment of a commercial town as an act of devastation was the case of Valparaiso, attacked in the year 1866 by the Spanish fleet, but, to quote the measured language of the late Mr. Hall, "the act gave rise to universal indignation at the time, and has never been defended." [5]

The article of Admiral Aube gave rise to great discussion, and it may be said that the proposition to subject undefended coast towns to destruction met with little or no favor. The Admiral's suggestion that they should purchase their immunity by ransom met a like fate, but a very lively and by no means unprofitable discussion has arisen over the question whether undefended ports, towns, and villages might be subject to requisitions and contributions.

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[2] Raikes, Correspondence, p. 367, quoted from the Annuaire de l'Institut du Droit International, 15:149.

[3] La guerre maritimes et les ports militaires de la France, Vol. L., pp. 314–346.

[4] Loc. cit., p. 331.

[5] Hall, International Law, 5th ed., 556, note 2. For an elaborate statement of this unjustifiable and unjustified bombardment, see Moore's International Law Digest, § 1170.

There is no recent writer on international law who enjoys greater and more merited authority than the late Mr. W. E. Hall, and for this reason he is selected to voice the view of publicists:

> Two questions are suggested by the above indications of opinion and of probable action on the part of naval powers. First, the restricted one, whether contributions and requisitions can legitimately be levied by a naval force under threat of bombardment, without occupation being effected by a force of debarkation; and, secondly, the far larger one, whether the bombardment and devastation of undefended towns, and the accompanying slaughter of unarmed populations, is a proper means of carrying on war. The latter question will find its answer elsewhere.
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> Requisitions may be quickly disposed of. They are not likely to be made except under conditions in which a demand for the article requisitioned would be open to little, if any, objection. A vessel of war or a squadron can not be sent to sea in an efficient state without having on board a plentiful supply of stores identical with, or analogous to, those which form the usual and proper subjects of requisition by a military force. It is only in exceptional and unforeseen circumstances that a naval force can find itself in need of food or of clothing; when it is in want of these, or of coal, or of other articles of necessity, it can unquestionably demand to be supplied wherever it is in a position to seize; it would not be tempted to make the requisition except in case of real need; and generally the time required for the collection and delivery of large quantities of bulky articles, and the mode in which delivery would be effected, must be such that if the operation were completed without being interrupted, sufficient evidence would be given that the requisitioning force was practically in possession of the place. In such circumstances it would be almost pedantry to deny a right of facilitating the enforcement of the requisition by bombardment or other means of intimidation.[6]
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> Contributions stand upon a different footing. They do not find their justification in the necessity of maintaining a force in an efficient state; they must show it either in their intrinsic reasonableness, or in the identity of the conditions, under which they would be levied, with those which exist when contributions are levied during war upon land. Such identity does not exist. In the case of hostilities upon land a belligerent is in military occupation of the place subjected to contribution; he is in

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[6] If articles are requisitioned which are not needed for the efficiency of the force, such as articles of luxury, or articles which will not be used by it, but will be turned into money, a disguised contribution is of course levied, and the propriety or impropriety of the demand must be judged by the test of the propriety or the impropriety of contributions.

it, and remains in it long enough to deprive the inhabitants of the equivalent of the contribution demanded, by plundering the town, or by seizing and carrying off the money and the valuables which he finds within it; he accepts a composition for property which his hand already grasps. This is a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which he is not, which he probably dare not enter, which he can not hold even temporarily, and where consequently he is unable to seize and carry away. Ability to seize and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment are indissolubly mixed up with the right to levy contributions, because they render needless the use of violent means of enforcement. If devastation and the slaughter of noncombatants had formed the sanction under which contributions are exacted, contributions would long since have disappeared from warfare upon land. It is not denied that contributions may be rightly levied by a maritime force; but in order to be rightly levied they must be levied under conditions identical with those under which they are levied by a military force. An undefended town may fairly be summoned by a vessel or a squadron to pay a contribution; if it refuses a force must be landed; if it still refuses, like measures may be taken with those which are taken by armies in the field. The enemy must run his chance of being interrupted, precisely as he runs his chance when he endeavors to levy contributions by means of flying columns. A levy of money made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right.

The Institute of International Law, as was to be expected, has devoted great care and attention to the question raised by Admiral Aube, and in the session at Venice in 1896 prepared and adopted a series of articles dealing with the question, which may be taken as representing the enlightened opinion of publicists as a whole. Important in themselves, the rules have an additional claim to our attention because they facilitated the work of the Second Conference and the close similarity between the convention as actually adopted and the rules of the Institute will become apparent by comparison of the respective texts. Before setting forth the rules *in extenso* it should be said that the manual of the Institute referred to is the manual of the laws of war adopted at the Oxford session of the Institute in 1881, and for sake of convenience the articles referred to are printed in the foot-note.

ART. 1. There is no difference between the rules of the law of war as to bombardment by military forces on land and that by naval forces.

ART. 2. Consequently, there apply to the latter the general principles enunciated in article 32 of the manual of the Institute — *i. e.,* it is forbidden (*a*) to destroy public or private property, if such destruction is not commanded by the imperious necessity of war; (*b*) to attack and bombard localities which are not defended.

ART. 3. The rules enunciated in articles 33 and 34[7] of the manual are equally applicable to naval bombardments.

ART. 4. In virtue of the foregoing principles, the bombardment by a naval force of an open town — *i. e.,* one not defended by fortifications or other means of attack or of resistance for immediate defense, or by detached forts situated in proximity to it, for example, at the maximum distance of from 4 to 10 kilometers — is inadmissible, except in the following cases:

(1) In order to obtain by means of requisitions or of contributions what is necessary for the fleet.

Nevertheless, such requisitions and contributions must remain within the bounds prescribed by articles 56 and 58[8] of the manual of the Institute.

(2) In order to destroy dockyards, military establishments, depots of munitions of war, or vessels of war found in a port.

Moreover, an open town which is defended against the entrance of troops or of disembarked marines may be bombarded in order to protect the landing of soldiers and of marines if the open town attempts to

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[7] ART. 33. The commander of the attacking troops ought, except in case of assault, before beginning a bombardment, to do all he can to advise the local authorities.

ART. 34. In case of bombardment all needful measures shall be taken to spare, if it be possible to do so, buildings devoted to religion and charity, to the arts and sciences, hospitals and depots of sick and wounded. This on condition, however, that such places be not made use of, directly or indirectly, for purposes of defense.

It is the duty of the besieged to designate such buildings by suitable marks or signs, indicated in advance to the besieger.

[8] ART. 56. Impositions in kind (requisitions), levied upon communes, or the residents of invaded districts, should bear direct relation to the generally recognized necessities of war, and should be in proportion to the resources of the district. Requisitions can only be made, or levied, with the authority of the commanding officer of the occupied district.

ART. 58. The invader can not levy extraordinary contributions of money, save as an equivalent for fines or imposts not paid or for payments not made in kind. Contributions in money can only be imposed by the order, and upon the responsibility, of the general in chief, or that of the superior civil authority established in the occupied territory; and then, as nearly as possible, in accordance with the rule of apportionment and assessment of existing imposts.

> prevent it, and as an auxiliary measure of war in order to facilitate an assault made by the troops and disembarked marines, if the town defends itself.
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> There are specially forbidden bombardments, whose sole object is to exact a ransom (Brandschatz), and, with greater reason, those destined only to induce the submission of the country by the destruction, without other motive, of peaceable inhabitants or their property.
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> ART. 5. An open town may not be exposed to bombardment by the sole fact —
>
> (1) That it is the capital of a state or the seat of government (but, naturally, these circumstances give it no guaranty against bombardment).
>
> (2) That it is actually occupied by troops, or that it is ordinarily garrisoned by troops of various arms, destined to rejoin the army in time of war.

In the year 1900 the Naval War Code, prepared by Captain (now Admiral) Charles H. Stockton, was promulgated for the use of the navy, and article 4 of this code is as follows:

> The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in ports, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given.
>
> The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden.

We are now prepared to examine the convention regulating bombardment by naval forces in the light of the opinion of a distinguished publicist, Mr. Hall; in the light of the rules and regulations of the most distinguished body of international jurists, the Institute of International Law; and in the light of the practice of the United States.

Article 1 of the convention provides that "the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden." This provision is simply declaratory of theory and practice. The concluding paragraph of article 1 is new and provides that "a place can not be bombarded solely because automatic submarine contact mines are anchored off the harbor." The paragraph last quoted simply means that the presence of automatic submarine contact mines is not of itself sufficient to justify bombardment of an otherwise defenseless port or town. The mines may undoubtedly be destroyed, but for their destruction the conference did not regard a bombardment of the otherwise undefended town as necessary or proper. It should be said, however, that Great Britain, France, Germany, and Japan entered their reservations against this rule.

Article 2 is as follows:

> Military works, military or naval establishments, depots of arms or war *material,* workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.
>
> He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.
>
> If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

An examination of this important article shows that it is declaratory of enlightened theory as well as practice, for a town used as a military or naval basis can not reasonably claim the immunity which arises solely by reason of a defenseless condition. This provision is in accord with the matured view of Mr. Hall, who says:

> Of course nothing which is above said has reference to the destruction of property capable of being used by an enemy in his war. No objection can be taken to the bombardment of shipbuilding yards in which vessels of war or cruisers can be built. Of course, also, a belligerent is not responsible for devastation caused by, say, the accidental spreading of a fire to a town from vessels in harbor burnt because of their possible use as transports, or from burning naval or military stores.[9]

It is also in accord with article 4, section 2 (previously quoted), of the rules of the Institute of International Law.

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[9] Hall, International Law, 5th ed., p. 536, note 3.

The last paragraph of the second article of the convention permits immediate bombardment for the destruction of the noxious material, but in such a case "the prohibition to bombard the undefended town holds good" and the commander is bound to take "all due measures in order that the towns may suffer as little harm as possible." The reason for this seeming exception from immunity provided by article 1 is due to the fact that the local authorities may prevent the intervention of the enemy by the destruction of the noxious material. If, however, they refuse, it seems only proper to allow the enemy to use the force and the means necessary to destroy the articles in question. If damage occurs the local authorities would seem to be to blame, for they might possibly have destroyed the material without subjecting the community to the possibility of injury. In any case the convention insists that the town itself shall suffer as little harm as is consistent with the destruction of the property.

Article 3 is likewise declaratory of existing law and practice, for it permits bombardment for "requisitions for provisions or supplies in question." Lest, however, the demand for requisitions might amount to a ransom or might permit devastation, it is provided that the requisitions shall be in proportion to the resources of the place. The entire article, unobjectionable in theory as it is in practice, follows:

> After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.
>
> These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

It will be noted that the late Mr. Hall allowed, with certain reservations, bombardment to enforce contributions, and article 4, section 1, previously quoted, of the rules of the Institute of International Law likewise sanctioned such bombardment.

Article 4 of the convention denied the right in the following expressed terms:

Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

The remaining articles (5, 6, and 7) extend to naval bombardment the principles and restrictions already found in the laws and customs of war on land for bombardment (articles 25, 28, revised convention). The exact text of the concluding articles of the convention concerning bombardment by naval forces follows, and needs neither explanation or comment:

> ART. 5. In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.
>
> It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.
>
> ART. 6. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.
>
> ART. 7. A town or place, even when taken by storm, may not be pillaged.

The convention, therefore, is as humanitarian as it is wise, and is in strict conformity with the practice and custom of enlightened nations. The only provision of this admirable little convention likely to produce criticism or justify objection is the concluding paragraph of article 1, prohibiting bombardment solely because automatic submarine contact mines are anchored off the harbor. How serious this may be only the future will show, but the convention as a whole is declaratory of the practice of enlightened nations and is in accord with the views of the most recent and authoritative publicists. By removing doubt and ambiguity, by making that certain which seemed to be uncertain and doubtful, the convention amply justified itself, and it can only be regarded as a genuine and further step in the march of universal progress.

JAMES BROWN SCOTT.

# CONVENTION FOR THE ADAPTATION OF THE PRINCIPLES OF THE GENEVA CONVENTION TO MARITIME WARFARE[1]

We are here to give an account of the charge confided to us to draw up a text upon which to base your deliberations. Before giving a brief outline of each one of the propositions which we have the honor to submit, it may be useful to make some remarks of a general nature.

The authors of the convention of 1899 were naturally guided by the fundamental principles of the convention of 1864, considered the starting point for the provisions to be made to cover maritime warfare; they sought to find the rules which, in accordance with these principles, would permit the securing on sea of the humanitarian results already obtained on land. An agreement was easily reached in the conference and it may not be useless to recall that the drafting committee which had unanimously supported the project they had prepared was for the most part made up of naval officers.

We have now before us a new Geneva Convention of July 6, 1906, destined to replace the convention of August 22, 1864. The former was signed by the representatives of more than thirty states and has already been ratified by eleven of them. The question has naturally arisen if it would not be well to take advantage of the new convention to complete the work of 1899. This does not mean that the convention of 1864 in its essential features is modified by that of 1906; the fundamental principles remain the same. The aim has been to combine the results of experience and the commentaries of jurists, to fill in the gaps, and to do away with uncertainty, but not to undertake something new. We are in the same situation as regards the convention of 1899. We do not believe that there is need of any essential changes; it can only be necessary to find out if in the light of the convention of 1906 there is not need of completing the convention of 1899, at the same time remaining true to the spirit from which it evolved.

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[1] This article is a translation of Prof. Louis Renault's admirable report to the Second Peace Conference. For the Geneva Convention of 1906 the reader is referred to the article on that subject by Gen. George B. Davis, which appeared in this JOURNAL, I:410. — MANAGING EDITOR.

A great debt of gratitude is due to the German delegation for the conscientious work which it has undertaken for the purpose of adapting to the convention of 1899 the extensions and amendments added to the convention of 1864. Our labor has been much simplified thereby. The object will be simply to see if there are not in certain respects differences between naval and continental war such as to explain the reason for not applying purely and simply to the one the solution adopted for the other. Sometimes analogies are more apparent than real.

The proposals of the French delegation have likewise in view the completion rather than the modification of the convention of 1899 by providing for the cases which were overlooked in the latter. Certain amendments proposed by the delegation of the Netherlands tended, on the contrary, it would seem, to modify the principles of the convention of 1899.

The commission had first to decide the question, "Should the convention of 1899 remain in an amended or completed form; or should a new convention be drawn up in which the provisions retained and the new ones adopted were combined?" The second method was adopted without hesitation. The supplementary texts are somewhat long and deal with matters too distinct to be combined without great difficulty. In a matter of this kind, where rules to cover difficult situations are laid down, the text adopted should be clear, precise, and easy of consultation.

The convention of 1899 contains fourteen articles; the project which we submit has twenty-six. This difference should not cause dismay. It must not be thought that any very great changes have been made in the work of 1899, which conserves its own structure unaltered by the proposed additions, which should not be the cause of any serious dispute.

The title of the convention must evidently be changed. The substitution of the date of "July 6, 1906," for that of "August 22, 1864," suffices.

Articles 1 and 2, relating to military hospital ships and to the hospital ships of belligerents, are articles 1 and 2 of the convention of 1899 retained without change.

Article 3,[2] on the contrary, modifies article 3 of the convention of 1899. The majority of the commission has in fact adopted an amendment proposed by the German delegation based upon article 11 of the convention of 1906. To understand the difficulty which arises it is necessary to compare the case provided for by the latter convention with the analogous case which occurs in maritime warfare. A relief society of a neutral country wishes to come to the aid of one of the belligerents. Subject to what conditions can this be done? Such a society must first receive the consent of the government of its own country, then the consent of the belligerent whom it wishes to aid and under whose direction it must place itself. It will temporarily form a part of the sanitary service of the belligerent, as is shown by the obligation imposed by article 22, paragraph 1, to display the national flag of the belligerent besides the flag of the convention.

In 1899 it was a question as to the situation of hospital ships of neutral countries disposed to offer their charitable aid. No precedents existed, since the convention of 1864 did not provide for the case of neutral ambulances, and until the convention of 1906 it was a disputed question whether such ambulances could fly their national flag or whether they should display that of the belligerent. In this connection the committee of 1899 expressed the following sentiment:

> It has been proposed to require that neutral hospital ships place themselves under the direct authority of one of the belligerents. A careful study has shown us that such a provision would give rise to serious difficulties. What flag would the ships in question fly? Would there not be something in the nature of a violation of neutrality in the fact of a

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[2] ARTICLE 3. Hospital ships, equipped entirely or in part at the expense of private persons or of officially recognized societies of neutral countries, shall be respected and exempt from capture, upon the condition that they are placed under the direction of one of the belligerents, with the previous assent of their own government and with the authorization of the belligerent itself, the latter having notified their names to the adversary at the commencement of, or during the course of, the hostilities, and in any case before it is employed.

ship's having an official commission to be incorporated in the navy of one of the belligerents? It seemed to us that it would suffice if these ships which are primarily under the control of the government from whom they have received their commission were subjected to the authority of the belligerents in accordance with the provisions of article 4.

These reasons are, in the opinion of certain members of the commission, of no less force to-day. They feel that the text of article 11 of the convention of 1906 is not sufficient to invalidate them. A neutral ambulance which wishes to help the belligerent in its relief work must in the very nature of things be incorporated in that service; it is hard to imagine its being free from control within the lines of the belligerent, who must be responsible to his adversary for its acts and who should in consequence have authority over it. The case seems to be different for a neutral hospital ship which operates on the open sea, where it enjoys an independence of action to which an ambulance can not lay claim. Moreover, it is added, a neutral hospital ship may intend not to help one belligerent more than the other, but to remain in the vicinity of the naval operations ready to render assistance to both parties. This presents no inconvenience because of the means at the disposal of the belligerents to prevent the abuses which might accompany the charitable assistance.

This reasoning did not convince the majority of the commission, which opined for a change in article 3, so as to make it in accord with article 11 of the convention of 1906. Reasons of military expediency necessitate, it is said, this action; that the independence allowed the neutral hospital ship would leave the way open to serious abuses which article 4 does not contemplate and could not repress.

That is why the commission proposes the modification of article 3, to conform to the convention of 1906. Article 3 refers solely to the obligation for the neutral hospital ship to place itself at the service (hospital service, of course) of one of the belligerents. Article 5, *new,* paragraph 4, makes the logical application of this provision respecting the flag to be displayed by the neutral ship so employed. It is worth while to note that the text of this is not, whatever may be said, in perfect harmony with article 11 of the convention of 1906, in accordance with which a neutral ambulance displays two flags — that of the Geneva Convention and that of the belligerent —

while the new paragraph of the fifth article provides that the ship shall carry three flags: the flag of the Geneva Convention, its national flag, besides the flag of the belligerent displayed at the mainmast. We know of no precedent along this line. The text proposed by the German delegation has been changed because it was thought unnecessary to exact that the hospital ship *place itself in the service of the belligerent;* it is enough to say that it place itself *under its direction.*

Article 4 is not changed. It seems to have provided the belligerents with sufficient powers to prevent abuses.

Article 5 is retained for the most part. Its object is to indicate the manner in which the hospital ships are to be distinguished.

A modification of the fourth paragarph and the addition of two new paragraphs are to be noted.

The modification has been explained above in relation to the provisions of the project bearing on the situation of neutral hospital ships. If the system adopted by the commission be not retained by the conference it would be necessary to return to the text of the convention of 1899.

The new paragraph 5 is intended to apply the provision of article 21, paragraph 2, of the convention of 1906, to the matter of which we treat. That provision reads as follows: " * * * Sanitary organizations which fall into the power of the enemy do not display any flag except that of the Red Cross as long as they continue in that situation." The situation is not identical for a hospital ship, which would not, it seems, *fall into the power of the enemy* in the same way as an ambulance, which, in point of fact, is within the lines of the enemy and more or less apt to be confused with his own organization. The provision was intended to apply to the case of ships *detained* in accordance with the terms of article 4, paragraph 5. In consequence the wording of the German amendment was slightly modified. The rule found in article 5, paragraph 5, *new,* has a very wide application and comprises all cases. If the hospital ship of a belligerent is retained by the adversary, it hauls down its national flag and only retains the flag of the Red Cross. In the case of a neutral hospital ship it hauls down the flag of the belligerent into the service of which it has entered but retains its own national flag.

Finally, the sixth paragraph, *new,* refers to the distinctive marks to make the hospital ships recognizable during the night. The German delegation proposed the following provision: "As a distinguishing mark all hospital ships shall carry during the night three lights — green, white, green — placed vertically, one above the other, and separated by at least three meters." Various objections were raised. The provision seemed imperative in its nature, but a hospital ship which accompanies a squadron can not be made to give away its presence to the enemy; it should be free to make its presence known or not, subject to the danger of being exposed to an attack if its character is not apparent. Further, a ship might make an illicit use of the lights, to effect its escape. The commission adopted a text which met these objections; the ships which wish to secure during the night the respect to which they have a right must take, in accord with the military authorities, the measures necessary to secure their recognition — in other words, they must see that the characteristic painting indicated in paragraphs 1 to 3 of the same article appear distinctly. That, it seems, is possible and would not permit the abuses to which the lights might give rise.

The new article 6 is based upon article 23 of the convention of 1906. It can give rise to no difficulty.

Article 7, *new,* provides for a situation analogous to that covered by articles 6 and 15 of the convention of 1906, but more infrequent to-day, at least, in naval warfare than in war on land. The amendment of the German delegation might have led to a slight confusion where it says: "During the conflict the sick quarters on board the war vessels shall be respected as much as possible." The first thought was only in reference to fighting at a distance, which is by far the more frequent, and naturally it was hard to understand how during such a conflict the sick quarters could be respected. But the provision refers to a conflict on board, which makes it perfectly comprehensible. A slight modification in the text of the amendment alone was necessary to dispel this obscurity.

Article 8 is new.

The principle laid down in the first paragraph is borrowed from article 7 of the convention of 1906, which is self-evident.

The second paragraph is due to article 8 of the convention of 1906, all the provisions of which it has not seemed necessary to reproduce. The personnel of the hospital ships and the sick quarters of men-of-war may be armed, either to maintain discipline on board or for the protection of the sick and wounded. This fact is not of a nature to warrant the withdrawal of protection as long as the arms are only used for the purposes indicated. For the same reason the agent placed on board a hospital ship by a belligerent in conformity with section 5 of article 4 should not be made prisoner of war in case he falls into the power of a cruiser of the country to which the hospital ship upon which he is belongs. His presence is explained, like that of the picket guarding sick quarters, by the necessity of permitting a ship to fulfill its charitable mission; this motive justifies in each case the exemption from captivity.

The German delegation had provided for the case in which "the hospital ship is armed with light pieces of artillery to guard against the dangers of navigation, and more particularly as a protection against all acts of piracy." A discussion took place in the drafting committee in regard to the artillery with which a hospital ship might be provided, and finally the opinion which prevailed was that the arming of the ship was by no means necessary. Merchant ships are not armed and do not run greater risks. Of course it would be permissible to have a cannon on board for signal purposes.

The delegation of the Netherlands has proposed to offer explanations relative to the presence on board of a radio-telegraphic outfit. After discussion the majority of the commission felt that the presence of such an outfit was not a fact in itself of such a nature as to justify the withdrawal of protection. A hospital ship may have to communicate with its own squadron or with land for the purpose of fulfilling its mission. It is not every use of a radio-telegraphic outfit but only certain uses which may be considered illicit, and it is well to recall here article 4, paragraph 2, by which the governments agree not to make use of hospital ships for any warlike purpose. The carrying out of such a provision, like many others, is left to the good faith of the belligerents. Moreover, the provisions of article 4 would allow commanders of men-of-war to take the measures necessary to prevent abuses; an agent could overlook the usage of radio-telegraphy; in case of need the apparatus of transmission might be removed.

Article 9 is entirely new, although it contains in substance article 6 of the convention of 1899.

According to paragraph 1 the belligerents may appeal to the charitable zeal of neutral merchantmen to take the wounded or sick on board and care for them. This provision is based upon article 5 of the convention of 1906; it is stipulated that the assistance of the neutral ships is entirely voluntary, and the text of the German amendment was modified to prevent any misunderstanding.

Paragraph 2 governs the situation of ships which have responded to this appeal as well as those which have of their own accord picked up the wounded, sick, or shipwrecked [belligerents] (The condition of individuals on board will be examined further on.) It is said that these ships *enjoy special protection and certain immunities.* These expressions, borrowed from the convention of 1906 (article 5), have been criticised on the ground of their vagueness, which can not be controverted. It is hardly possible to proceed otherwise; all depends upon circumstances. A war ship may call upon a ship perhaps far off, promising, for example, not to search it. It is evident that the advantages of the immunities do not hold the place here that they do on land, where the inhabitants to whom an appeal is made are exposed to a series of rigorous measures on the part of the invader or the occupant. Above all, it is a question of good faith. A belligerent should keep to the promise which he has made in order to obtain a service, and the neutral ought not to be permitted by a show of zeal to escape the risk to which his conduct may have rendered him liable. It is, however, certain, on the one hand, that the ships in question may not be captured for the transportation of the shipwrecked, wounded, or sick of a belligerent, and, on the other hand, as is expressly stated by article 6 of the convention of 1899, they remain subject to capture for the violations of neutrality which they may have committed (contraband of war, blockade running).

Article 10 is a reproduction of article 7 of the convention of 1899, with an unimportant modification designed to harmonize the provisions regarding land and maritime war as regards the treatment of the members of the hospital staff temporarily retained by the enemy (*cf.* article 13 of the convention of 1906). It is not necessary to add that, for maritime as well as for land warfare, the official personnel only is concerned, the personnel of a relief society having no claim to receive a salary.

Article 11 corresponds to article 8 of the convention of 1899, which it completes in accordance with article 1, paragraph 1, of the Geneva Convention.

Article 12 is new; it corresponds to an amendment presented by the German delegation (third paragraph added to article 6), the provision of which it makes general. We do not think that the rule is new; if the formula is not to be found in the convention of 1899, the sense of the latter is unquestionable. It is an important point upon which there should be no doubt.

A belligerent cruiser which meets a military hospital ship or a floating hospital, a merchant ship, whatever be the nationality of these vessels, has the right, either by virtue of article 4 of the convention or by virtue of the common law of nations, to visit them. It exercises it and finds on board shipwrecked men, wounded or sick; it has the right to have them delivered up to it, because they are its prisoners, as it is stated in article 9 of the conventon of 1899, reproduced in article 14 of our project. We have here only an application of a general principal, by virtue of which the combatants of a belligerent who fall into the power of the opposite party are by that fact its prisoners. Evidently, it will not always be to the interest of the belligerent to make use of this right. Often it will be to his advantage to leave the wounded or sick where they are and not to take charge of them. But, in such a case, it will be indispensable not to allow wounded or sick to go free who are still in a condition to render great services to their country; this fact is still more true in regard to shipwrecked men who are not incapacitated. It has been said that it would be inhuman to force a neutral vessel to deliver up the wounded which it had charitably picked up. To do away with this object, it is only necessary to reflect upon what would be the situation were there no convention. The positive law of nations would permit not only the seizure of individuals who are enemy combatants, found on board a neutral vessel, but the seizure and confiscation of the vessel for having rendered an unneutral service. Let us add that if the shipwrecked men, for example, were permitted to escape captivity by the mere fact of their having been taken on board a neutral vessel the belligerents would disregard the philanthropic action of the neutrals the moment this action might result in causing them irreparable injury. Humanity would not gain by it.

It is well to add that article 12 of the project limits what the belligerent cruiser can do in regard to neutral merchantmen; it can not change their course and impose upon them a fixed course. Article 4 of the convention of 1899, preserved by the project, gives this right only in respect to vessels specially given over to the hospital service, which have to bear the consequences attendant upon the particular duties for which they are designated. Nothing of a similar character could be imposed upon merchant vessels which occasionally are willing to aid in a charitable work. There can be no argument against article 9 of the convention, which we propose to retain (article 14 of the project) because this article does not have to do with vessels, but only treats of the sick and wounded.

Article 13, proposed by the French delegation, is new; it fills a blank in the convention of 1899 and should not be the cause of any difficulty. The case arose during the recent war, and was decided, after some hesitation, in accordance with the idea of the project. Shipwrecked men, sick or wounded, picked up by a neutral man-of-war are in exactly the same situation as that of combatants who take refuge in a neutral territory. They are not given up to the adversary, but they must be detained.

Article 14 reproduces purely and simply article 9 of the convention. Amendments proposed by the German delegation and the delegation of the Netherlands were withdrawn because of the restoration of article 10 of the convention.

The extent of article 14 has been determined by what was said above in regard to article 12 of the project; it has to do only with the treatment of individuals, not of vessels, which are provided for elsewhere.

Article 15 is only the reproduction of article 10 of the convention, which for special reasons, having nothing to do with the principle of the article, had not been ratified. Its restoration was allowed without difficulty upon the proposal of the French delegation. The situation in view was that where war vessels disembark wounded or sick in a neutral port, unburdening themselves in this manner. It might be a question whether the neutral was not furnishing assistance contrary to the laws of neutrality, and might not be held responsible by the other belligerent. The proposed solution seemed to take sufficient account of the respective interests. It has been remarked that article 15 seems to impose quite a heavy burden upon the neutral state, since it could not answer in all cases for the escape of the interned men; would it not be sufficient to say, as in article 13, that they have taken measures for the purpose indicated? It has been said in reply that the form of the two articles is explained by the difference in the situations. The commander of the neutral man-of-war who has picked up wounded or sick can not keep the individuals which he has so picked up; the situation is different in the case of the authorities of a neutral country. Only it is understood that all that can be demanded of the authorities of the neutral country is not to be negligent; responsibility presupposes the fault.

If a neutral merchant vessel, having occasionally picked up wounded or sick, even shipwrecked men, arrives in a neutral port without having met a cruiser and without having entered into any agreement, the individuals which it disembarks do not come under the provision; they are free.

Article 16 is new; it is borrowed from the convention of 1906 (article 3). It has been thought strange that the words "interment" and "cremation" were left in. Naturally, they will not often apply in the case of naval operations. But it must be remembered that a conflict may take place near the shore and that the provision applies to the individuals who may be on land.

Article 17 is new. It corresponds to article 4 of the convention of 1906.

Article 18 is a reproduction of article 11 of the convention of 1899.

Article 19 is new. It corresponds to article 25 of the convention of 1906.

Article 20 is new. It corresponds to article 26 of the convention of 1906. We consider it very important. The best of rules become a dead letter if measures are not taken in advance for the instruction of those who will have to apply them. Especially the *personnel* of the hospital ships or floating hospitals will often be called upon to fulfill a very difficult mission. They must be convinced of the necessity of not taking advantage of the immunities which they enjoy to commit belligerent acts; the result would be to ruin the convention and all the humanitarian work of the two peace conferences.

Article 21 is new. It corresponds to articles 27 and 28 of the convention of 1906, and has given rise to no difficulty.

Article 22 is new. It presents no difficulties in the case of military operations taking place at the same time on land and sea; the new convention must be applied to the forces afloat, and the convention of 1906 to the forces which operate upon land.

Article 23 is a reproduction of article 12 of the convention of 1899.

Article 24 is a reproduction of article 13 of the convention of 1899, changing only the date of the Geneva Convention.

Article 25 is new and corresponds to article 31 of the convention of 1906.

The convention, the project of which we submit to you, will replace the convention of 1899 in the relations between those powers which both sign and ratify it. If we suppose two powers having signed the convention of 1899, and one of them only to have signed the new convention, the convention of 1899 will necessarily continue to govern their relations.

Article 26 is a reproduction of article 14 of the convention of 1899.

Such is the project which we submit for your approval. It is a modest work, in which he have been guided by our forerunners of 1899 and 1906. We nevertheless consider it very useful and we think that the enactment of the project into a diplomatic convention will constitute a real progress in the direction of the codification of the law of nations.

Louis Renault.

# THE ELEVENTH CONVENTION PROPOSED BY THE HAGUE CONFERENCE OF 1907

All progress towards world reform yet accomplished has been made at a slow pace. Only those who forget this are impatient at the outcome of the Hague conference of 1907.

Much of its time was devoted to matters of comparatively small moment. It was wise to have it so. Forty or fifty sovereign powers can hardly come into a position to deal to advantage in legislative fashion with large questions until they have found themselves able to agree on those of less importance. The natural thing therefore happened. Vast changes in international relations, such as would be produced by general arbitration treaties, world prize courts, or fixed limitations of armaments, were civilly mentioned and passed on for future consideration. But, a few projects of that character having thus been gently put aside, a great many projects of minor interest were discussed thoroughly and frankly, and finally placed in such shape as to give promise that they will soon become part of the law of the civilized world.

In this way the last in number of the four commissions, from which was to come the material for the action of the conference, became perhaps the most prolific of results. It was constituted to act in a narrow field. It had nothing to do except with what was related to naval warfare. It had nothing to do with that, except with reference to humanizing it and establishing certain juridical relations which might grow out of it affecting the interests of private individuals.

Let the attention of any small body of men, trained to share in the functions of government, and therefore necessarily familiar with the larger features of law, be concentrated in our day upon the study of the juridical relations arising out of certain facts, and they will, by the very nature of their task, be inclined to agreement. They are considering universal ideas. They are considering them in the light of the justice belonging to an advanced civilization. They are interpreting or ascertaining or reframing rules of law; and law in its essence belongs to the realm of the eternal, and is one for all men who are able to see it as it is.

The conference referred seven subjects to the Fourth Commission for investigation. Of these, five were of a kind that intimately concerned the special interests of the leading powers. These were the seizure of private property of subjects of the enemy at sea, contraband of war, blockade, the destruction of neutral ships at sea, and the general application to sea warfare of the rules already established for warfare on land. It is not surprising that the commission found itself able to do little or nothing in respect to any of them.

The remaining subjects, the transformation of merchant ships into men of war and the treatment of merchant ships of the enemy away from home at the outbreak of war, fared better because the interests of the different powers were in less opposition. The conventions recommended, however (the sixth and seventh, as adopted), were deemed by the delegation from the United States to be steps backward, and their approval was withheld.

This disposition of the business referred to it would have left the work of the Fourth Commission comparatively insignificant had it not been for its taking up additional matters brought before it otherwise than by the original action of the conference and forming no part of the official program prepared by Russia. These took shape in the eleventh convention.

That of most importance to most people is the agreement that correspondence by mail shall be inviolable. Whether official or private, whether pertaining to the conduct of the war or not, letters, though from the enemy, are not to be opened unless the ship be seized going to or coming from a blockaded port. Reservation is made of the right of visitation and search; but the visit is to be made only when it seems necessary, conducted with all consideration, and closed as quickly as possible.

This is a natural consequence of the growing unification of the postal systems of the world under the Universal Postal Union. with its little world legislature, which has been so long and so usefully in operation. It is also a mark of the progress of scientific invention. Letters carried on shipboard are a slow and cumbrous mode of sending intelligence, when compared with what is offered by methods of electrical transmission. Little was therefore asked in extending the rule of inviolability of postal matter even to enemy's ships bearing enemy's dispatches.

Germany brought this subject before the commission and treated it as an incident of the law of contraband. Herr Kriege presented the views of his delegation in that connection:

> Postal relations [he said] have at our epoch such importance — there are so many interests, commercial or other, based on the regular service of the mail — that it is highly desirable to shelter it from the perturbations which might be caused by maritime war. On the other hand, it is hardly probable that the belligerents who control means of telegraphic and radio-telegraphic communication would have recourse to the ordinary use of the mail for official communications as to military operations. The advantage to be drawn by belligerents from the control of the postal service therefore bears no proportion to the prejudicial effect of that control on legitimate commerce.[1]

The German proposal was but slightly modified in the convention as adopted. It did not originally contain the saving as to blockade runners, but the incorporation of that limitation was obviously proper.

The doctrine so vigorously supported by the Supreme Court of the United States in *The Paquette Habana*[2] was brought to the notice of the commission by its president, M. de Martens, who invited discussion as to the liability of fishing boats to be seized as prize, by special reference to it in a *questionnaire* which he sent out to its members.

The presiding officer of any deliberative body has in Europe even greater opportunities of influence and control than belong to such a position in the United States. M. de Martens, as president of the Fourth Commission, used his initiative with great effect. He also gave, on many occasions, a turn to the direction of discussion which proved decisive. In summing up a debate, before putting the question, he had the art of letting the full weight of his own opinion be felt, without declaring it, though occasionally speaking out with great plainness. In closing the discussion on the proposal to affirm the inviolability of all private property at sea, to support which a quotation from one of his own works had been read, he observed that he had indeed so expressed himself forty years ago; "he was then by conviction a partisan of the rule of inviolability, but that since that distant epoch he had become more circumspect regarding this delicate question." A vote having been taken, showing twenty powers in favor of the proposal to eleven (including Russia) in opposition and one not participating, he remarked that in view of the populations of the powers voting against it, and their naval strength, the result hardly possessed the value of a decisive indication of international sentiment.[3]

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[1] See a discussion of this subject in Hershey's International Law and Diplomacy of the Russo-Japanese War, p. 153 *et seq.*

[2] 175 U. S. 677.

The proposed exemption of fishing boats received its first definite form at the hands of Portugal. Her delegation (annexe 45) suggested that it be confined to boats in the territorial waters of the country, or in the usual fishing zone off its coasts. Mindful of the Dogger Bank incident, they added a prohibition of approach by the boats near to men of war of the enemy. Large fishing vessels, destined for distant voyages, were to be subjects of prize.

Austria-Hungary presented a more liberal scheme. This (annexe 43) included any small craft found in territorial waters engaged in "*économie rurale*," or petty local traffic. They might, however, be seized if needed for military use, but in such case the owners were to be indemnified.

Norway proposed that the indemnity should cover the value of the boat and 10 per cent. additional; this to be paid over at the time of seizure, if possible.

The Italian delegation now called attention to a provision in their code by which the ships of a belligerent employed on a purely scientific mission might remain in Italian ports as long as they chose, and advocated an extension of the proposed exemption of fishing craft to all vessels employed in scientific or humanitarian voyages. From France came the suggestion that voyages for religious and missionary purposes should be included.

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[3] Session of July 17.

The provisions finally adopted showed that humanitarian rather than military considerations controlled the commission. The feeling may be said to have been universal that wherever the range of war could be contracted in these directions, without serious interference with military necessities, it should be. The somewhat ambiguous phrase, "rural economy," was thus replaced by "services of petty local navigation;" and, contrary to the repeated insistence of the president, the exemption was made seemingly applicable to vessels moved by steam or other mechanical power.

No attempt was made to define how far coast fishing might extend beyond strictly territorial waters.

The provisions in the eleventh convention as to the fate of crews of captured merchantmen of the enemy were brought before the commission by Great Britain and Belgium. Their adoption constitutes a long step in advancing the interests of commerce. They take the crews out of the position of prisoners of war; release them entirely, if they are not enemies; and, if they are, release them on parole, to be evidenced by their written promise. The authorities of the enemy are to be notified of the names of those paroled, and are forbidden knowingly to employ them thereafter in military operations during the continuance of the war.

The discussion of this feature of the convention occupied much of the time of the commission during several sessions. It was fully recognized as a wide departure from the laws of war, as heretofore existing.[4] On the other hand, the vast proportions of modern international trade were felt to demand a new measure of protection, in the common interest of mankind.

That the field of war is likely to be narrower at the three points covered by this convention must be pronounced a gain to humanity. The general ratification of the eleventh convention would be a permanent extension of the bounds of peace. The prospect of such a ratification seems fair in view of the fact that each of the three articles was adopted by the conference without a single negative vote. Nicaragua and Paraguay, however, took no part in these votes, and the Argentine Republic formally abstained from voting on that establishing the inviolability of the postal service.

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[4] See, *e. g.*, the conventions between Great Britain and France of 1854 and 1860, quoted in Atherly-Jones on Commerce in War, p. 584.

SIMEON E. BALDWIN.

# THE SCIENCE OF INTERNATIONAL LAW: ITS TASK AND METHOD

## INTRODUCTION

The first volume of this American Journal of International Law has shown *urbi et orbi* that America possesses a number of prominent international jurists who are of equal rank to those of Europe as regards learning, idealism, constructive power, and literary skill. Undoubtedly, this Journal has at once with its appearance taken up the position of a leading magazine of the science of international law. By inviting only American jurists to contribute to the first volume of this Journal the learned editor has shown to the world that America is able to foster the science of international law without being dependent upon the assistance of foreign contributors. It is my firm conviction, based upon the study of American works, that, just as the body of rules which is called "international law" shows everywhere the traces of American influence, so the science of international law will likewise soon receive new stimuli from America. I have therefore thought it fitting, although I am not an American, to draw the task and the method of this our science into discussion in this Journal. In setting to work I desire it, however, to be understood that in endeavoring to deal with this difficult and controverted subject nothing is remoter from my intention than to set up as a high priest of our science, to lay down the law of its method, and to exhaust this wide and tempting subject. I rather hope that others will likewise take up the subject and treat it in the pages of this Journal. I shall, of course, be outspoken, shall mark my standpoint, and shall try to offer clear-cut views; yet I am well aware that my standpoint and my views will have to undergo the fire of criticism: *dixi et salvavi animam meam!*

But the following pages were not exclusively written for the purpose of drawing the matter into further discussion. They are likewise intended to serve as a guide to those younger students who are desirous of working up some problem of international law. My experience with a number of such students is that they are at first frequently quite helpless for want of method. They mostly plunge into their work without a proper knowledge of the task of our science, without knowing how to make use of the assertions of authorities, and without the proper views for the valuation and appreciation of the material at hand.

## I. THE SCIENCE OF INTERNATIONAL LAW NOT AN END IN ITSELF

The science of international law is just as little as any other science an end in itself; it is merely a means to certain ends outside itself. And these ends are the same as those for which international law has grown up and is still growing — primarily, peace among the nations and the governance of their intercourse by what makes for order and is right and just; secondarily, the peaceable settlement of international disputes; lastly, the establishment of legal rules for the conduct of war and for the relations between belligerents and neutrals.

Just as international law, so its science has to keep these ends always in view, and the task of the science stands in the service of these ends. But now-a-days it is impossible to say that there is only one single task to be fulfilled. There are rather a number of tasks to which our science must devote itself, if it intends to work successfully for those ends which I have defined, and these tasks are the following seven: Exposition of the existing rules of law, historical research, criticism of the existing law, preparation of codification, distinction between the old customary and the new conventional law. fostering of arbitration, and popularization of international law I shall discuss these tasks *seriatim,* although most of them are to a certain extent connected with one another.

## II. EXPOSITION OF THE EXISTING RULES OF LAW

Now, the first and chief task is the exposition of the existing recognized rules of international law. Whatever we think of the value of a recognized rule — whether we approve or condemn it, whether we want to retain, abolish, or replace it — we must first of all know whether it is really a recognized rule of law at all, and what are its commands. This task is often difficult to fulfill. The rules of the present international law are to a great extent not written rules, but based on custom. Apart from the International Prize Court agreed upon by the Second Hague Peace Conference but not yet established, there are no international courts in existence which can define these customary rules and apply them authoritatively to cases which themselves become precedents binding upon inferior courts.[1] The writers on international law, and in especial the authors of treatises, have in a sense to take the place of the judges and have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognized usage has now ripened into a custom, and the like. And with regard to the written rules — namely, such rules of international law as are the outcome of universal or general law-making treaties — the writers have again to take the place of the judges and have to ascertain the precise meaning of those rules with the help of interpretation. It is for this reason that text-books of international law have so much more importance for the application of the law than text-books of other branches of the law. Whereas the latter are only a means of preliminarily ascertaining the law, it being the judge who ultimately will lay it down, the former are as yet and for some time to come the only means of ultimately ascertaining what the law is. That at present many a rule is so controverted, and that the present treatises are not up to the ideal mark and frequently offer confusion instead of illumination, I do not deny. But that is just the reason why an inquiry into the task and the method of the science of international law is necessary.

## III. HISTORICAL RESEARCH

However this may be, the exposition of the existing recognized rules of international law is often to a certain extent impossible without a knowledge of the history of the rules concerned. There is therefore an historical task for our science. Yet in spite of the vast importance of this task it has as yet hardly been undertaken; the history of international law is certainly the most neglected province of it. Apart from a few points which are dealt with in monographs, the history of international law is virgin land which awaits its cultivators. Whatever may be the merits of the histories and the historical sketches which we possess, they are in the main mere compilations. The master-historian of international law has still to come. What is particularly wanted is what the Germans call a "*Dogmengeschichte.*" We require to know of each rule of international law how it originated and developed, who first established it, and how it gradually became recognized in practice. Bearing in mind that the growth and development of international law since the seventeenth century rallied around Grotius' immortal work *De jure belli ac pacis,* the starting point of the investigation ought, of course, to be this "father" of international law. The questions to be answered are: Does Grotius know of the rule concerned? How does he justify it? Was it known before Grotius? If it was neither known before Grotius nor by Grotius himself, who was it who first formulated and established it? Has it always retained the scope which it possessed in the hands of its first professor, or had it been altered, extended, restricted? What are the causes of such alteration, extension, or restriction, if any? What are the chief events which show that it really has been authoritatively applied in practice? Has its authority always remained unshaken, or has its authority ever been assailed in theory or in practice or in both? Is it a rule which Grotius, or whoever first professed it, has abstracted from the actual practice of the states, or is it a rule which was at first asserted as the outcome of the law of nature and afterwards adopted by the practice of the states on account of its intrinsic merits for the adequate conduct of international affairs? Has it at once when it was professed become universally recognized, or had it to fight its way and thus only become recognized slowly and gradually? Was it always considered a rule of law, or does it originate from comity and has only become law lately? Is it a rule first asserted by bookwriters, or has it made its appearance during the exchange of diplomatic notes connected with the occurrence of certain events?

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[1] Unless it be created by the Central American Peace Conference, 1907. — EDITOR.

Of course, such a history of dogmatics can merely supply the building material which the expected master-builder will use for the purpose of a history of international law. For such history is only a branch of the history of Western civilization. All important events in the development of the state system of Europe from the last part of the Middle Ages downward to the French Revolution have had their bearing upon the development, the shaping, and the ultimate victory of international law over international anarchy, and so have all important events in the development of the state system of Europe and America since the French Revolution. And the master-historian, to whose appearance we look forward, will in especial have to bring to light the part certain states have played in the victorious development of certain rules and what were the economic, political, humanitarian, religious, and other interests which have helped to establish the present rules of international law. Thereby the factors will be laid bare which have driven the different states into the community called the "family of nations" that will in time comprise the whole of humanity. Just as out of tribal communities which were in no way connected with each other arose the state, so the family of nations arose out of the different states which were in no way connected with each other. But whereas the state is a settled institution, firmly established, and completely organized, the family of nations is still in the beginning of its development. A settled institution and firmly established it certainly is, but it entirely lacks at present any organization whatever. Such organization is, however, gradually growing into existence before our eyes. The International Prize Court created by the Second Hague Peace Conference is the first small trace of a future organization. The next step forward will be that The Hague peace conferences will meet automatically within certain periods of time, without being summoned by one of the powers. A second step forward will be the agreement on the part of the powers upon fixed rules of procedure for the future Hague peace conferences. As soon as these two steps forward are really made, the nucleus of an organization of the family of nations will be in existence, and out of this nucleus will in time grow a more and more powerful organization. What the ultimate characteristic features of this organization will be is at present impossible to foresee.

## IV. CRITICISM OF THE EXISTING LAW

Next to the exposition and the history of international law comes the criticism of its rules and of its present scope. This task of the science of international law is very important and must not be neglected, if we want international law to develop progressively and to bring more and more international matters under its sway. The questions which must be answered are: Is a certain rule really just and adequate, or is it antiquated, so that it ought to be restricted, abolished, or replaced? Or is it so valuable that it ought to be extended? But if ever so much importance is attributed to the criticism of the present condition of international law, it must never be forgotten that this law is like everything else conditioned by the *milieu* of the age. It is easier to criticise than to make proposals which shall take the place of the rule which is objected to, and it is again easier to propose a new rule than to establish it in the practice of the states. If anything is dependent upon gradual historical development, it is that delicate body of rules which is called international law. The dreamer and the schemer build their castles in the air without regard to the real facts of life. The armchair politician and the moralist lay down the law without regard to the possibilities of the age. The preacher and the philosopher defend postulates which are beyond realization in practice. But the international jurist must not walk in the clouds; he must remain on the ground of what is realizable and tangible. It is better for international law to remain stationary than to fall in the hands of the impetuous and hot-headed reformer. He who knows how difficult it is to unite all the members of the family of nations for the purpose of the shortest step forward will not lend his ear and his arm to chimerical proposals.

However this may be, the task of criticism is somewhat connected with another task of the science of international law, namely, that of preparing codification. For if we find fault with an existing rule of international law, it is now-a-days only by total or partial codification that matters can be improved.

### V. PREPARATION OF CODIFICATION

Now, the task of preparing codification is on its own part intimately connected with the already discussed three tasks of the science of international law, and it may be said that the task of preparing codification is nothing else but the embodiment of these three previously mentioned tasks. For there is no better way of preparing a codification of international law than, first, an accurate exposition of and a minute research into the existing rules; secondly, the bringing into view of their historical growth and development; and, thirdly, their reasonable criticism. A generation which has fulfilled these three tasks will easily be able to prepare the draft of a code of international law to be agreed upon and to be adopted by the nations in council at an international conference.

But in viewing this task of preparing codification it is necessary to emphasize that codification of international law does not necessarily involve a reconstruction of the present international order and a recasting of the whole system of international law as it at present stands. Naturally, a codification would in many points mean, not only addition to the at present recognized rules, but also repeal, alteration, and reconstruction of some of these rules. But however this may be, I do not believe that a codification ought to be or can be undertaken which would revolutionize the present international order and put the whole system of international law on a new basis. If I speak of preparation of codification as a task of our science, I have in view a codification of the body of the existing rules of international law on the basis of the at present existing international order, with such modifications and additions as are necessitated by the conditions of the age and the very fact of codification being taken in hand. If the at present recognized international law is once codified, nothing prevents reformers from making proposals which can be realized by a successive codification.

But does international law really require to be codified? Would it not be better to leave it for all the future in its uncodified condition as customary law? I do not propose to discusse here the merits of this important question; I have done it elsewhere, and it suffices to say that at least partial codification will at some future time become an absolute necessity. The practice and the views of the different states differ so much with regard to many important matters that it is only codification which can create agreement and unanimity, and thereby universally recognized rules of law. I have no doubt that the end of this the twentieth century will see at least a partial codification of international law.

Such codification will, however, never be possible unless the members of the family of nations are ready to compromise. Wherever the practice and the views of the different states are contrary to one another, no progress can be made as long as each state concerned expects the other to come round to its own views and to adopt its own practice. In some cases these different practices and views are based on vital interests of the states concerned. But in other cases no such interests are at stake, and it is therefore quite possible to come to a speedy agreement. Where vital interests are really involved no progress is possible as long as these interests are facing each other. But history teaches that interests which are vital to-day gradually lose their importance, and the time will come when a compromise is feasible and can be embodied in codification.

## VI. DISTINCTION BETWEEN THE OLD CUSTOMARY AND THE NEW CONVENTIONAL LAW

This codification has in a sense already begun and is to a certain extent already a fact. The declarations of Paris and St. Petersburg; the two Geneva conventions; the Hague conventions concerning the rules of land warfare, the adaptation of the Geneva Convention to warfare on sea, and the pacific settlement of international disputes; the conventions produced by the Second Hague Peace Conference — all these law-making treaties represent in themselves codification of parts of international law. But these conventions, although they are no doubt law making, represent codification in a sense only, and not really. For either they do not create universal international law—thus, the Declaration of Paris is not signed by all the members of the family of nations — or, although they are signed by practically all the members of the family of nations, and may, therefore, be said to create universal international law, they are notifiable, and each party can cease to be a party by giving notice; thus, even the new Geneva Convention of 1906 is notifiable, although that of 1864 is not. Now I personally doubt not that these conventions will never disappear without their place being taken by others of the same kind. But the fact that they contain a clause which enables their notification must not be lost sight of by the science of international law. The reason why they contain such a clause is, I believe, that the powers did not want to bind themselves forever and for all circumstances and conditions. They want first to feel their way and see how these conventions will work in practice before they bind themselves for all the future. Now, this condition of affairs involves a very important task for the science of international law. As there is no absolute certainty that these conventions will not one day come to an end by being notified, or that one or more of the parties will not cease to be bound by them by giving notice, the science of international law must not lose sight of the customary international law, if any, at the back of these conventions, and also of such customary rules as have been abolished and abrogated by the conventions concerned. For in the case of one or more or all parties giving notice, those old customary rules would revive, and the parties concerned would then in the same way be bound by these rules as they were before they signed the conventions. For instance, if a party to the Hague convention concerning the rules of warfare on land gave notice, it would indeed not be bound in the future by such rules of the convention as were newly created by the latter, but the customary rules at the back of the convention would be binding upon such party, such as the rules that poisoned arms may not be employed, that armistices must faithfully be carried out, that prisoners of war must not be cruelly treated, and the like. These formerly customary rules have therefore not only an historical value, but they are still of practical, although latent and dormant, importance. Authors of treatises must for this reason always make it apparent that the law of these law-making conventions is a grafting-twig on the trunk of the old customary law which might one day have again to be severed from the tree.

## VII. FOSTERING OF ARBITRATION

I come now to a sixth task of the science of international law. This task is connected with the fact that international law is a law not above but between states; that there is no central authority above the sovereign states which could compel them to comply with the rules of international law or to submit their differences to a juridical decision and arbitration instead of taking the law in their own hands and of resorting to reprisals or going to war. Most states are already inclined to settle differences by arbitration, provided these differences do not concern their independence, honor, or vital interests. But arbitration is as yet not obligatory for any matter, although we may in time expect a universal treaty of arbitration to be agreed upon which will make arbitration for some few matters obligatory. Now, it is a task of the science of international law to explore means and ways for bringing international differences more and more to arbitration and for defining those matters which may be made the object of obligatory arbitration. We want to know what disputes can be settled through a decision on juridical grounds, and what other matters can be settled by an arbitration which compromises between the interests at variance. And the science of international law will have to work out detailed rules of procedure for arbitration cases which come before the Permanent Court at The Hague or before other arbitration tribunals. The rules of procedure embodied in the Hague convention concerning the pacific settlement of international disputes are neither complete nor perfect. They are the result of a compromise, and they would not stand their trial if more, and specially more important, cases than hitherto were to go to the Hague Tribunal. The difficulties of the matter are created by the fact that the ideas of the different nations concerning procedure are so different. Thus, the English-American notions of what is evidence do not agree with the continental notions concerning the subject. Again, there is a deep and broad gap between the continental and the English-American ideas concerning the relations between court and counsel, the mode of examining witnesses, and the like. It will therefore not be so easy for the science of international law to construct a mode of procedure which finds approval on the part of continental as well as of English-American jurists. But the attempt must be made, although progress will naturally be only gradual and slow. It is a fact, which must not be lost sight of, that before such a mode of procedure is found as satisfies all round arbitration itself will likewise make only slow progress. It is no use having a court and stipulating arbitration for a number of cases, if the parties concerned have no confidence in the procedure before the court. What we want is not only that parties submit to arbitration, but that they have confidence in it — that they are convinced of the arbitrators' skill and ability to settle the dispute in an adequate manner. To realize this aim, we not only require learned, just, independent, and capable arbitrators, but also a mode of procedure for arbitration cases which in the eyes of the parties guarantees a just trial and an adequate consideration of their claims.

## VIII. POPULARIZATION OF INTERNATIONAL LAW

There is a last task of the science of international law which must be mentioned, namely, popularization of international law. The impotence and powerlessness of international law on many occasions of the past was to a great extent due to the fact that the rules of this law were not known by the leading politicians as well as by the "man in the street." That the great majority of the lawyers of all countries knows little or nothing of international law is a point which I will not here discuss at length. This fault can easily be remedied and made good, if international law is made a part of the study of the law students and an obligatory subject of their final examination. If I speak of the task of popularizing the rules of international law, I have in my eye the body of the educated classes who are not lawyers. The science of international law must try to make the rudiments of this law known not only to politicians, journalists, and historians; these rudiments ought also to be taught in all the secondary schools, and the teachers of history are the proper persons who could best undertake to teach this fascinating subject there. Politicians are in most cases not lawyers, and in our democratic times they are recruited from all classes of society. In important international conflicts the decision in many cases ultimately rests not with the leading men, but with public opinion and the "man in the street." Public opinion with regard to international questions is at present at the mercy of the press and the agitator, and it is common knowledge that the jingo and the chauvinist frequently make use of misguided public opinion for their own ends. If the public knew something about the merits of the case concerned they would frequently look upon the matter more coolly and in a more impartial way, and it would be easier for the governments to consent to arbitration.

Of course, this task of popularization is not an easy one, but I believe that it can be fulfilled. The question is not to make everybody an international lawyer, but to make the fundamental principles and rules of international law so well known that everybody has access to them and can acquire a knowledge of them. If it is possible to teach in schools such complicated subjects as physics, chemistry, and mathematics, why should it not be possible to teach the principles of international law, for which a course of a dozen lessons would suffice? As matters stand at present, there are neither proper teachers nor proper books at hand, but I have no doubt that here as elsewhere the demand would create the supply. As I have said before, the teachers of history are the proper persons to teach international law in schools, and there is many an international lawyer of repute who would not consider it beneath his dignity to write an elementary handbook for schools, if only the schools were ready to embody international law in their curriculum.

## IX. NECESSARY COOPERATION OF MANY WORKERS

I have tried to define the different tasks of the science of international law. It is obvious that they are beyond the power of a single individual. Cooperation of many is here wanted as in other fields. A man may be an excellent historical researcher, but no good as a popularizer. Another may possess that legal mind which predestines him for the analysis of intricate rules, but he may be impossible as an historical researcher. A third may be possessed of that political gift which enables him to make proposals for the improvement of the existing rules and to draft rules which, when generally accepted, would extend the scope of international law and bring such matters as are as yet outside the province of law and an object of mere political consideration within the province of law. But in spite of the fact that the body of the tasks is beyond the power of a single individual, now and then a single individual must endeavor to focus the results of his own and other people's labor in a treatise. The treatises which we possess — the present writer is allowed to say so, for he includes himself in the blame — are altogether poor in spite of the many merits they may have. Yet they can not be better than they are, for want of sufficient monographs. It is quite true that, if the author of a treatise is not a mere compiler, he does not entirely depend upon monographs, for he can embody the results of his own researches in his treatise. And where he does depend upon the monographs of others, he can throw new light on the problems and the results of the work of others by introducing his own views. But although he may be a genius in his way, he can not possibly pursue every question into its most remote corners; he must everywhere more or less build up his system of thought upon the fundaments laid by many other collaborators. And it is therefore that no one treatise alone can really embrace all the knowledge that is necessary for an international jurist. He who wants to acquire that knowledge will always be obliged to study several treatises written by authors belonging to different nationalities.

The want of monographs is altogether a want of men who can devote their time to research. When the study of international law once offers a career to candidates, matters will be different. At present there are only a few chairs in the universities and law schools whose occupants can entirely devote their labor and research to international law; special chairs of international law exist only in a minority of universities. When once every university and law school possesses at least one well-endowed chair of international law, and when the teaching and the study of this law has become an obligatory subject of the curriculum of all law schools, there will be a career open for those students who are inclined to devote their lives to research in the field of international law. We can then encourage our students to sit down and produce monographs, because these researches will not ultimately prevent their authors from gaining their livelihood, but will give them a chance of entering upon a settled career of life.

### X. THE DIFFERENT SCHOOLS OF THOUGHT

Having discussed the tasks of the science of international law, we can now turn our attention to its method. Now, whereas agreement with regard to the tasks is easily realized, there is no generally recognized method of the science of international law. The three schools of the Grotians, the Naturalists, and the Positivists are still in the field, and their methods are naturally different. The Grotians keep up the distinction of Grotius between the natural and the positive international law, the former comprising such rules of international law as are supposed to be based on the law of nature, the latter embracing such rules as are based on international custom and treaties. The Naturalists maintain that no positive law is possible for the regulation of the intercourse of the sovereign states, and that therefore all so-called international law is not real law, but only a part of the so-called law of nature. The Positivists recognize only a positive international law based on custom and treaties, and deny the very existence as well of a law of nature as of a natural international law. But besides these three schools there are to be mentioned the followers of Austin in England, who define international law as a part of the so-called positive morality; it is said to be "morality" because there can not be a law between sovereign states, yet it is "positive" morality because general opinion considers it binding.

All these schools are to-day represented by prominent men whose works have contributed to the progressive development of international law itself as well as of its science. To many it would therefore seem ridiculous to take part in the fray and to join one group and fight the others. As many roads lead to Rome, so many methods lead to good results. As long as a scholar joins at all the ranks of those who till the fields of the science of international law, why should he not be welcome, to whatever school he belongs? Let us judge him, so they say, not according to his method, but according to the fruits of his labor. Now, I quite agree that every worker is welcome, to whatever school he may belong, but it is nevertheless necessary to inquire into the question, Which method is the right one? For the right method secures the best results, and it is these we are aiming at. It is on account of the disagreement as regards the right method that we disagree so much as regards certain rules of international law. Scores of controversies in our science are merely due to the difference of method applied by the authors concerned. And how could it be otherwise? Do we not start from different standpoints? Do we not apply different standards of judgment? What greater contrast can there be than between him who preaches that no real law is possible between sovereign states, and him who asserts that there is such a law created by custom or set by conventions? How can two men come to the same results, if the one abstracts the rules of international law from the actual practice of the states, and the other from what he considers to be reasonable, just, and adequate? How can international law develop progressively if one man lays bare the gaps of the existing law and asks for their filling in through an agreement of the powers, whereas according to the opinion of the other man there are no such gaps, because the law of nature provides a complete system of rules of international law? How is it possible to offer a body of firm, distinct, and clear-cut rules of law, if rules of morality and of religion, if political aspirations and chimerical schemes for a better future, are constantly mixed up with what is really law?

## XI. THE LAW OF NATURE

It is for this reason that the decision as to the right method depends upon two preliminary questions: First, the question of the existence of a natural law a part of which a natural international law could be; and, secondly, the question whether there can be a law at all between sovereign states, and therefore whether international law is or is not real law. I propose at present to deal only with the first question, and I will at once emphasize that according to my opinion we are now-a-days no longer justified in teaching a law of nature and a " natural " law of nations. But do we thereby not shake the very fundament of international law as laid by Grotuis? How can we teach, what we all do, that Grotius became immortal by founding international law and the science of international law, if we deny the existence of the rock upon which Grotius thought to have built up his system? Is it not a well-known fact that Grotius founded the law of nature for the mere purpose of having an eternal and unshakable basis for the foundation of the law of nations?

My answer is that Grotius was not an infallible Pope. He was a child of his time and therefore a product of his age. Although he is rightly called the father of the law of nature as well as of the law of nations, he has created neither the one nor the other. Long before Grotius, the opinion was generally prevalent that above the positive law which had grown up by custom or by legislation there was in existence another law which had its roots in human reason and was therefore called the " law of nature." And likewise long before Grotius it was quite usual to deduce from the law of nature certain rules for the intercourse of the sovereign states. Grotius is nevertheless rightly considered the father and founder of both the law of nature and the law of nations, because he focussed the results of the works of his forerunners in his own work in such a masterly way and with such a felicitous hand that his system of the law of nature and nations pushed the work of his forerunners in the background — absolutely overshadowed it — and became the starting point for all the future works in the same field. Thus, in spite of his immortal merits, Grotius was only a child of his time and a product of his age. All of us, if we had lived in his time, would certainly have been adherents of the law of nature. At that time and age, the law of nature was a necessity. It was not a product of the fertile brain of one single individual, consciously thought out for the purpose of creating something hitherto not existing. Nothing of the kind! It was an epoch in the evolution of human reason, and it supplied one of the necessary crutches with whose help mankind walked out of the institutions of the Middle Ages into those of modern times. Three powers and systems of thought have broken the fetters in which the Middle Ages had kept Western mankind: the philosophy of pure experience, the Reformation, and the law of nature. The philosophy of experience brought freedom from scholasticism. The Reformation endeavored to lead mankind back to the original teachings of Christ. The law of nature brought social and constitutional liberty, called into existence the modern constitutional law, and laid the foundation of the law of nations.

But the law of nature has played its part. We know now-a-days that it is impossible to find a law which has its roots in human reason only and is above legislation and customary law. The innumerable systems of the professors of the law of nature neither agree in scope, nor in contents, nor in definitions, nor in the very number and contents of the rules which they profess to draw from reason. Nobody denies the right of an author to criticize the existing legal rules, to condemn the prevailing social conditions, and to construct a body of rules which, when accepted, would constitute an improvement. But such rules, although ever so much supported by reason, justice, and equity, would not be rules of law before they were either by custom or by legislation adopted for the future conduct of those concerned. Enormous as the importance and the function of the theory of law of nature has been for the past, it is for our times not only without any value whatever, but directly detrimental. It weakens the eyes of those who profess it. It prevents the proper criticism of the existing positive law. It constantly mixes up the past, the present, and the future. It offers a breach through which the deniers of the law of nations can easily come in and attack the very existence of an international law. And therefore it is that the place of the theory of the law of nature is no longer in our textbooks, law schools, and universities, but in the museums where the scientific tools are preserved with which former generations did their best to lay the foundation of our present scientific knowledge.

I know quite well that this emphatic denial of the law of nature exposes me to attacks. Most French and other Romanic and also some British and American jurists will stigmatize my standpoint as "unscientific," for they consider it inferior work to collect the "crude" real rules of international law without regard to the "higher" rules of the law of nature. And many in whom the mere sound of the term "positive" creates a shudder will, as "idealists," oppose my standpoint of "positivism." Now, to the argument that my standpoint is not scientific, I simply answer that the mere term "science" implies knowledge, and that it is a demand of science to stick to the facts, and not to hunt phantasms. And the law of nature is nothing else than a phantasm! It requires much more scientific skill to expose the real existing rules of international law, to lay bare their history and real meaning, and to criticize them in the light of reason, justice, and the requirements of the age, than to teach the rules of a law of nature in the clouds. On the other hand, to the "idealists" I have to answer that I am myself an idealist, if by that term is characterized a man who rejects the materialistic explanation of the world and believes in the eternal progress of mankind towards the good, but that my standpoint as regards the method of the science of international law has nothing to do with idealism or positivism in the philosophic meaning of those terms.

## XII. THE DENIERS OF INTERNATIONAL LAW

Quite as detrimental as the theory of the law of nature is the theory of all those who deny to international law the character of real law. I have elsewhere endeavored to develop the essential characteristics of law and to show that international law bears all these essential characteristics. The mistake which is constantly made by the so-called deniers of international law is essentially one of method. They start with a wrongly conceived definition of law, and they must consequently deny the character of law to all such bodies of rules for human conduct as can not be fitted into that definition. From Hobbes down to Blackstone and Austin it is always the same wrong starting point — municipal law. They draw their definition of law in general from that of municipal law and define it as the body of rules imposed by a sovereign upon his subjects. Yet even this definition of municipal law is wrong. It contains a part but not the whole of the truth. It explains neither the existence of customary law, nor the fact that the sovereign has the legal power of imposing legal rules of conduct upon his subjects. But apart from this, I do not deny that there is an essential difference between municipal and international law. I do not maintain that international law is a law of the same power and strength as municipal law. I do not maintain that international law can undo municipal law. What I maintain is that municipal law, constitutional law, ecclesiastical law, and international law are all branches of the same tree of law in general as a body of rules for the conduct of the members of a community, which rules shall by common consent of the community be eventually enforced by external power, in contradistinction to rules of morality which by common consent of a community concerned are to be enforced by conscience only. Those who do not recognize international law as law because it does not fit their definition are like that renowned German professor of philosophy whose theories were fine but did not fit the facts, and who, when confronted with this, answered: "So much the worse for the facts!"

The question is not whether municipal courts consider international law binding upon themselves. Their attitude depends upon the fact whether the municipal law of their individual state considers international law as a body or in some parts the law of the land, or, in other words, whether the municipal law of their individual state has incorporated international law in the law of the land, as the United States of America has done. The question is rather whether the governments of the states which as a body make the family of nations consider international law binding upon themselves in their intercourse with one another. Now, nobody can deny that the governments do this, although they may on an occasion deny that a certain rule is a rule of international law, or may in a special case declare that they act by right in not carrying out a recognized rule of international law. Of course, we have as yet no decision of courts which are binding precedents. The cases which we possess as yet are either arbitration cases which are hardly connected with one another, or mostly prize court cases which are municipal cases and which, whatever their force as precedents may be for courts of the same country concerned, are not binding upon courts of other countries. But this condition of affairs will soon undergo a change. An international prize court has been established by the Second Hague Peace Conference, and a really permanent arbitration court will, I believe, be established by the Third Hague Peace Conference expected to meet in 1915. These really international courts will in time produce precedents which will possess the same degree of binding force for international law as precedents of municipal courts possess for municipal law.

It has been said that the question whether international law is real law or not, is merely a question of terminology and not worth fighting about; especially with regard to the followers of Austin, who consider international law "positive morality," and who do not deny its binding character. I would readily agree to this, if all the Austinians consented to consider this "positive morality" for all practical purposes as law, although they do not do it in theory, and if they consented to apply the rules of jurisprudence to the interpretation of the rules of international law. But that is just what they, or at least some of them, refuse to do. They rather consider international law more a body of mere principles than a body of legal rules, and they are far from consenting to these principles being applied and interpreted like other legal rules. They want to reserve to the individual governments a greater liberty of action with regard to the rules of international law than these governments would have if international law is considered real law, pure and simple. There is no doubt that these followers of Austin attribute to international law a lesser degree of binding force. And it is therefore that the question whether international law is or is not law, is ultimately not only a question of terminology but one of great and material importance. The argument that a sovereign can not be bound in the same way as a subject does not hit the point, for everybody agrees that international law is not a law above but only between the states. A rule of international law can not, without their special consent, be imposed upon the states, as a rule of municipal law can be imposed upon the subjects of a state without their special consent. But if they once consent to submit themselves to a rule of international law, states are bound by such rule to the same extent and degree as subjects are bound by rules of the municipal law of their state.

### XIII. IN WHAT THE POSITIVE METHOD CONSISTS

If we exclude the law of nature and what is called "natural" international law altogether, and if we consider international law real law, the method to be applied by the science of international law can be no other than the positive method. In what this method consists and what it demands, I shall now have to demonstrate.

To put the matter in a nutshell, I can say: The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and researcher may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law-making conventions. Authors of treatises on the municipal law of contract, tort, and real property now-a-days no longer start from the rules of a law of nature concerning these matters, but expose at once the customary or statutory rules concerning them. Why should the authors of treatises on the law of war, of neutrality, and of other parts of international law start from a law of nature, and not at once expose the customary and conventional rules concerning these subjects?

The fact that Grotius and many of his followers did start from the law of nature can not be authoritative for the method to be applied now-a-days when there are enough customary and conventional rules in existence for the construction of a fairly complete system of international law, and when we know that any rule of the so-called law of nature lacks all legal force and authority.

Now, how are the existing recognized rules of international law to be ascertained?

In so far as conventional rules are concerned, it is to a certain extent easy to find them. They are written rules. Their scope, their meaning, and their extent can in many cases be grasped at a first glance. If we only possess accurate copies of the authentic documents in which these rules are embodied, and if we are able to master the language in which these documents are drawn up, we often get at their meaning without great difficulty. But frequently they nevertheless present doubt and uncertainty enough, and then they require interpretation, a matter which I shall discuss later on (see below XVIII, pp. 349–353). However this may be, written rules never offer such great difficulties to the science of international law as rules based on custom. It is because international law is still to the greater extent based on custom that the text-books differ so much with regard to the rules they lay down as rules of international law. Many of these book rules are mere fancies, the outcome either of what the respective authors consider the law of nature, or of patriotic prejudice, or of misunderstood authority, and the like. If the method of the science of international law is to be positive, no rule must be formulated which can not be proved to be the outcome of international custom or of a law-making treaty. However great the authority of a writer may be who asserts the existence of a rule, and be it Grotius himself, the science of international law has no right to lay down the rule concerned as really existent and universally or generally recognized unless it can be ascertained that the members of the family of nations have customarily or by a law-making treaty accepted the rule. And the greatest caution is necessary in weighing the practice of the states for the purpose of ascertaining whether there is a certain custom or not. For it is possible that there is a usage only, but no custom. Of course the line between a mere usage and a ripe custom is frequently difficult to draw, for usages have a tendency to ripen into customs. And it is with regard to this matter that an ingenious text-book writer can do good work. If he has a sharp eye, if he understands how to feel the pulse of his age, if he possesses the necessary historical insight, he will be able to see that many a usage has ripened into a custom between his own time and that of his predecessors. But the greatest care must be applied to avoid the teaching of rules which either do not exist at all or not to the extent asserted by book writers. It is not the task of a writer to fill in the gaps in the existing rules of international law unless a conclusion *per analogiam* suggests itself with such force that its acceptance is obvious and absolutely necessary. Of course, the gaps must be brought into view, and the writer may offer an opinion *de lege ferenda* how to fill them in; yet there must always be clearness and distinctness between the writer's opinions *de lege ferenda* and really recognized rules of law. It is no use drawing up definitions and principles which do not agree with the facts as evidenced by the practice of the states. Wherever these facts are not clear, are uncertain, are not numerous enough to enable the researcher to see the full extent of a certain practice, definitions must be drawn up in a more or less ambiguous way, if they are at all necessary. It is a thousand times better to leave a question open than to answer it incorrectly. The science of international law can neither step into the place of legislation and of codification, nor into the place of custom. It is a fact that as regards many questions the practice of the states differs so much that either no unanimity whatever can be stated to exist, or only with regard to some points. Thus, for instance, anyone who undertakes to write about the law of blockade or contraband can only state that certain rules are universally recognized, but that as regards many questions there is a hopeless difference between the practice of the different groups of states. It shows bad manners, if not gross ignorance or bad faith, if many authors simply declare the practice of their own state as the one corresponding to the rules of international law, denouncing the other party or parties as delinquents. Thus, the abuse to which during the Russo-Japanese war the Russians were submitted on the part of several English and American writers for having sunk such neutral merchantmen carrying contraband as they were unable to bring into a port of a prize court was absolutely out of place. For although I believe that the English practice to release such vessels is a good practice, which ought to become universally recognized, there is no doubt that it is as yet not recognized, and that the practice of several states is the contrary.

Of course, an author who carefully sticks to the facts and leaves all those questions open concerning which no general or universal practice can be stated to exist will frequently be abused and blamed. The reader wants certainty and authority, and if he finds no certain opinion but a statement of divergent opinions he feels betrayed and helpless. But his good sense ought to tell him that his interests are better served by the author's honesty in stating that there is no settled practice; for by acting in this way the author makes it obvious that international law really has no generally recognized rules concerning the matter, and that it is open to a party to act independently and to select that solution of the problem concerned which is the best according to the party's own judgment.

## XIV. APPRECIATION OF MUNICIPAL CASE-LAW

The divergence noted in the practice of the different states with regard to many points leads me to a very important question of method, namely, the position to be taken up by the science of international law towards cases decided by municipal courts. At a first glance there would seem for a positive method of our science no better way to gain unassailable results than by following as closely as possible such case-law. And most of the English and American international jurists think and act accordingly, and they are therefore possessed of an unappeasable case-hunger. Whenever a question turns up, they ask for a case to be thereby guided. This case-hunger is the consequence of two facts. The English common law consists entirely of case-law and has grown up from precedent to precedent, and our lawyers are therefore accustomed to seek a precedent for every new case that arises. On the other hand, customary law and judge-made law are in England and America frequently identified, and our jurists are therefore disinclined to diagnose the existence of a customary rule of law unless the courts have recognized such a rule in decided cases.

Now, I do not deny the great importance of case-law in general and of such municipal cases in particular as touch upon questions of international law. But the science of international law must be careful in the appreciation of such municipal case-law.

We have, first, not to lose sight of the fact that municipal courts can not through their decisions directly call a rule of international law into existence. It is in a sense quite correct to speak of judge-made law within the province of municipal law, for here judges are in a sense and to a certain extent makers of the law. Do they not fill in gaps of the law with new law which they find *per analogiam?* Do they not to a certain degree alter the existing law by interpreting it equitably, reasonably, and adequately? Do they not, many a time, with the help of interpretation develop a body and a system of rules out of one single principle of the law? Do they not frequently shape a rule of law to fit it to the requirements of an individual case? The municipal law shows everywhere on its body the finger-prints of the judges and other traces of their handiwork. But in spite of all this, I should not call a judge a real law-maker in the sense of a law-giver. A real law-maker is a power, like parliament, which can arbitrarily make and unmake law to any extent, according to its mere discretion, in perfect independence of any other authority in the land, and not in any way limited. Our judges, however, in shaping and making the law can never act arbitrarily like a real law-maker, can never make and unmake law according to their mere discretion. They are always bound by considerations which are far from arbitrariness, and they can shape and make the law to a certain limited extent only and in a certain limited degree only. As far as they do shape and make the law they do it with the express consent of the real law-maker in the land; they are tools in the hands of custom and legislation. They are law-shapers, law-developers, law-finders, and law-excavators, but not real law-makers and law-givers. But however this may be with regard to the municipal law of the different states, as far as international law is concerned municipal courts can not make any law or shape the existing law. Cases decided by them do indeed become precedents for the judges of the country concerned, but they are not international precedents — are not *per se* binding upon municipal courts of other countries. This is a rule without an exception, and the decisions of prize courts are not excluded from the rule. Even if it were true, what is commonly maintained in

England in consequence of a *dictum* of Lord Stowell, that the law applied by prize courts is international law, the decision of these courts, which are of course municipal courts, could *per se* never have the force of precedents outside their own country. I do not deny — having in my mind Lord Stowell's wonderful judgments — that the intrinsic value of many such decisions and the convincing arguments which accompany them had their bearing upon courts of other countries and thereby in fact made these cases precedents which are followed by the courts of all or many other countries, but in law and *per se* they are and remain precedents for the judges of their own country only. I do likewise not deny that the intrinsic value of such decisions may be the cause of the rising of general or universal customs within the family of nations which create rules of international law based upon and abstracted from such decisions, but the decisions can not by themselves and without the aid of custom or law-making treaties call those rules of international law into existence.

We have, secondly, not to lose sight of the fact that municipal courts can not through their decisions take the life out of a recognized rule of international law. The fact that municipal courts declare that a certain rule of international law can not be enforced by them, or does not exist at all, may be a precedent for the judges of the same country, but the rule itself remains thereby unshaken, provided it is a recognized rule at all. Thus, after the South African war, English courts declared that a rule of international law concerning the succession of the conqueror into the debts of the conquered state did not exist and could not be enforced in English courts. But these decisions could not take the life out of the rule concerned, if it did exist at all. If it can be proved that during the nineteenth century up to the South African war conquerors felt in duty bound to pay the public debts of the conquered, that public opinion of the world at large approved of and expected this attitude, that all authoritative writers considered this attitude necessary, the question only is, whether succession into these debts is based on a mere usage or on a custom, and whether such custom is universal or only general. It is not within the competence of municipal courts to decide these questions; it is rather a matter between the governments of the states which are members of the family of nations, and could ultimately only be decided by a court of arbitration. And however this may be, the individual creditor of the conquered state has no direct claim upon the conqueror; it is the home state of such creditor which by the right of protection over his subjects which is due to him can claim from the conqueror payment of the conquered state's debt. Municipal courts, although they might recognize the existence of the rule of international law concerned, may at the same time have to declare that they could not enforce a claim of a private individual based upon such rule, on account of the fact that they are only competent to deal with claims based upon municipal law.

After these reservations, I can define the standpoint from which the science of international law can make use of municipal case-law bearing upon questions of international law. I have already said that such case-law is of the greatest importance, for it brings into view the practice of the courts of the individual states. If this practice is everywhere the same, it may be taken for granted that a universally recognized rule of international law is at its background. If, on the other hand, this practice differs, it may be taken for granted that no universally recognized rule exists with regard to the question concerned. If, thirdly, this practice differs to such an extent only that a few courts refuse the recognition of a rule, whereas many recognize it, it may be taken for granted that there is a generally, although not universally, recognized rule in existence with regard to the question concerned. Again, if this practice differs so much that it must be taken for granted that no generally or universally recognized rule is in existence, the science of international law can examine the different decisions; can point out the relative value of the different groups; can single one out as the most adequate, reasonable, and just; can thereby foster the growth of future unanimity. It must, however, be specially emphasized that for the existence of a rule, and in especial for the recognition of a growing rule, of international law it is ultimately not the attitude of municipal courts, but that of the states themselves and their governments, which is decisive. It is quite possible that a state refuses to recognize the existence of a certain rule of international law, although a court of the land has declared that such rule does exist. And it is likewise possible that a court of the land refuses to acknowledge the existence of a certain rule which the government of the land concerned does recognize either now or hereafter. International law is a law between states, which concerns states only and exclusively; it can not *per se* concern municipal courts, but only when it has partly or totally been incorporated into the law of the land. The attitude of municipal courts can not therefore directly concern international law, although it is, as I have shown, of the greatest importance for the science of international law.

However this may be, two particularly grave sins of method are frequently committed by writers in the treatment of decisions of municipal courts.

The first is that they fall on their knees and worship the decisions of the courts of their own country, while they abuse the differing decisions of foreign courts. Look, for instance, at the position taken up by such an excellent international jurist as the late Mr. Hall with regard to the question of continuous voyage. Whereas he defends the English decisions concerning this matter, he abuses the American decisions during the civil war which extend the doctrine of continuous voyage to what I call circuitous and indirect carriage of contraband. If, on the other hand, we take a look round on the Continent we find many text-book writers who abuse both the English and the American decisions concerned! Or, to give another example, take the English and American decisions concerning enemy character. English and American writers quote them as representing universally recognized rules of international law, but the fact is that the French, the Italians, the Germans, defend opinions which are contrary to many of these decisions! The science of international law must here, as on other occasions, aim at impartiality. A writer is, of course, called upon to draw attention to the cases bearing upon international law which have arisen in the courts of his own land. But he must exercise criticism on these decisions as well as on foreign decisions. He must never abuse the latter. He ought always to bring into view the different standpoints. He ought always to be aware of it and make it quite clear to his readers when the practice of the courts of his own country differs from the practice of foreign courts.

The other grave sin of method frequently committed by writers making use of case-law is to bring case after case, with all details, without defining the principles which are the basis of the decisions given in the cases concerned. If this wrong method is applied, the writers as well as their readers can not see the wood for the trees! The right method is to abstract the principles from the decisions, and then to quote the decisions themselves as examples of the application of the principles. Of course, this is very delicate work and not to everybody's taste. It is much easier to pile case upon case and to leave it to the reader to draw the conclusions from these decisions than to find out the broad principles which are brought to light in these decisions, and to select only a certain number of typical cases as leading examples. But the science of international law can not forego this work, however difficult and painstaking it may be. Let it be said with emphasis that the collecting of cases without sifting them and without abstracting the rules they are supposed to bring into view is without any value for the science of international law, unless it is done only for the purpose of collecting material.

## XV. APPRECIATION OF ARBITRATION CASES

From municipal cases I must turn the attention of the reader to arbitration cases. In appreciating the decisions of arbitration courts, writers likewise show frequently a wrong method. They take it for granted that such decisions have the force of precedents, and that the principles which are brought into view through such decisions must henceforth be recognized as settled principles of international law. Take, for example, the appreciation of the verdict in the Alabama Case. American and some English writers maintain that according to the verdict of the Geneva Court of Arbitration the three rules of Washington are settled rules of international law.

But nothing of the kind is really the case. Although England and America agreed, by the Treaty of Washington, to observe these rules between themselves, to bring them to the knowledge of other maritime powers, and to invite the latter to accede to these rules, no such communication and invitation, and therefore no accession on the part of third powers, has taken place. England and America could not communicate the three rules to other powers, because the arbitration court put a construction upon the term *due diligence* and asserted other opinions which are contested and which England could not accept. It is therefore not admissible to assert that these three rules of Washington are settled rules of international law, although it may safely be stated that these three rules became the starting point of the movement for the recognition of the rule that neutrals must prevent their subjects from building and fitting out to the order of belligerents vessels intended for warlike purposes.

Another example is the decision of Louis Napoleon as arbitrator in the case of the "*General Armstrong*." Judgment was given in favor of Portugal, because the *General Armstrong* chose to defend herself against the attack on the part of the English aggressors instead of demanding protection from the neutral Portuguese authorities. Several text-book writers assert that in consequence of this decision it is a settled rule of international law that a neutral is freed from responsibility for a violation of neutrality through a belligerent attacking enemy forces on neutral territory, in case the attacked forces, instead of trusting for protection or redress to the neutral, defend themselves against the attack. Now I do not mean to say that such or a similar rule will never be recognized; yet it is certainly not correct to maintain that it is already settled. For nothing of the kind is really the case. The only safe thing to say is that this decision has been given, and that the underlying principle might perhaps in course of time become a recognized rule of international law, although I personally have my doubts about this.

The position to be taken up by the science of international law towards decisions of courts of arbitration must at present be one of caution and reserve. Three groups of cases are to be distinguished. First, the parties may agree to bind down the arbitrators to the application of a rule or rules upon which the parties have agreed. Secondly, the arbitrators may be directed to give their decision according to recognized rules of international law. Lastly, the arbitrators may be directed to settle the dispute anyhow, which means according to their best judgment, *arbitrio boni viri.*

Now, it is obvious that decisions belonging to the first and the last group can certainly not establish and settle rules of international law, although their intrinsic value may be the starting point of a movement for the customary growth of a certain new rule. As regards decisions belonging to the second group, all depends on the rule applied by the arbitrators. If the rule is really one which is generally or universally recognized, the decision will furnish an example and proof of its validity. If the rule is not generally or universally recognized, but recognized by the practice of some states only and approved of by some authoritative writers only, the decision will help the rule to become generally or universally recognized. If the rule is one found *per analogiam* or out of considerations of equity, the decision may be the starting point of a movement for the recognition of the rule. But if the rule is based on error of judgment and ignorance, the decision is of no value whatever, and the science of international law has to put its finger into the wound and has clearly to point out that the rule applied by the arbitrators does not exist and will never become generally recognized.

Of course, matters will soon undergo a change. The permanent International Prize Court agreed upon by the Second Hague Peace Conference, which is able to revise decisions in prize cases given by municipal prize courts, will in time establish a real international prize-case law. This court will of course follow its own precedents, the different states will submit to these precedents, and the science of international law will be able to abstract the rules and principles which are at the background of these precedents. That this court will adopt many decisions given in the past by English, American, French, and Italian prize courts, I have no doubt, for the bulk of them really represents common sense and justice, and is in conformity with generally recognized rules of international law. But, on the other hand, I have likewise no doubt that it will reprobate some of these decisions.

As regards the decisions of the so-called Permanent Court of Arbitration established by the First Hague Peace Conference, matters are different. This court is not in fact a permanent court, but simply a body of individuals from which the parties select a number who are constituted as the court for a special case. As by the rules concerning these courts it is not stipulated that every successive court is bound by the decisions of his predecessors, it can and will happen that such decisions of former courts as do not recommend themselves by their intrinsic value and the force of the accompanying arguments will not be followed by their successors. But there is no doubt that the Third Hague Peace Conference will establish a really permanent court of arbitration, and the latter will of course always follow its own former decisions as precedents. What I have said with regard to the permanent International Prize Court applies therefore likewise to this future permanent court of arbitration; it will establish real international case-law, and the time will come when the science of international law will be able to bring into view judge-made international law.

## XVI. APPRECIATION OF AUTHORITIES

Having discussed the appreciation due to municipal case-law and to arbitration cases, we now must approach the question, What appreciation is due to authoritative writers on international law. Here I must at once emphasize that it is quite common to make improper use of so-called authorities and to overestimate the value and importance of the mass of the literature on international law. Our English and American books go far beyond what should be done by calling everyone an "authority" who has ever written a treatise or a monograph on international law. It is right and just and helpful that a writer should enumerate the works of those before himself who wrote on the matter concerned. Yet to head such a list of literature by the term "list of authorities" is entirely wrong and misleading, unless every author of a literary production must needs be considered an "authority." But nothing of the kind is actually the case; it will always be necessary to make a distinction between writers at large and writers of authority. Now, who are the authoritative writers? They are those whose works have gained great influence; have become guides of the practice of the states, and storehouses of the opinions, usages, and customs of their generation; are expounding the existing law with accuracy, care, and ability; and are throwing side-lights on its development and improvement. Such writers of authority are of much more importance for international law than for municipal law, for in the absence of international courts and of judge-made international law writers have, as pointed out before (see above, II, pp. 314–315), a much more influential position. International law can stand just as little as municipal law the hair-splitting tyranny of the letter and the word of a legal rule. International law requires therefore, just as much as municipal law, reasonable and equitable interpretation. International law must likewise be adapted to the requirements of the circumstances and conditions of the age, and must likewise be shaped to fit the merits of the individual case. In the absence of international judges, writers have to satisfy these requirements. The teachings of authoritative writers take, therefore, within the province of international law, to a certain extent the place which judge-made law has within the province of municipal law. Assertions of authoritative writers will therefore naturally carry great weight with regard to the question whether a certain rule of international law is or is not in existence, and what is its scope, its extent, and its proper meaning. Yet ultimately it is not the authoritative assertion of a writer which decides the question, but the fact that it can be proved that the rule is really recognized and followed in practice to the extent and with the scope and meaning as asserted by the writer concerned. For even great authorities make mistakes, are influenced by their political fancies, take usages for customs, take the future for the present, confound their own opinion with what is generally recognized. The unanimous assertion of even a great number of authorities can not really make a rule of international law, if this rule is not customarily recognized in practice. Take, for instance, the rules asserted to exist by the majority of authoritative text-book writers with regard to the matter of intervention, and compare with these assertions the actual practice of the states! All these rules are mere book-rules, fancies of their authors, but not recognized rules of international law. Now, I will not deny that many rules which are now customarily recognized can be traced back to the authority of a writer or writers. Grotius and Bymkersbock and other authorities have first asserted a number of rules which the practice of the states afterwards adopted. But it is not the authority of these great men, but the practice of the states concerned, which ripened into custom and made these rules rules of international law. And times have changed considerably. It is no longer to be expected that the assertions of authoritative writers will so easily as in former ages become the starting point of a practice which ripens into custom. Times are more critical than they used to be. A fairly complete system of rules of international law has grown up. States are now-a-days more inclined than formerly to settle certain matters by law-making treaties, instead of leaving them to the mercy of the writers and the slow growth of usage and custom.

However this may be, wherever authoritative writers assert the existence of a customary rule, great care is necessary in positively verifying its existence, contents, scope, and real meaning. That it must carefully be distinguished from a mere usage, I have stated before (see above, XIII, p. 334). But even if a real custom can be diagnosed, the question is still whether it is a universal or only a general custom. Text-book writers mostly overlook that there are scores of rules which are customarily recognized, although one or more individual states refuse to recognize them. The fact is that these rules are based upon a *general* custom only, whereas others are based on a *universal* custom and are therefore recognized by every member of the family of nations. Take, for instance, the rule that fishing boats belonging to enemy subjects can not be attacked and seized by a belligerent. That this rule is based on a general custom, there is no doubt. But the custom is not universal. The fact that Great Britain has never recognized it prevented the rule from being universally recognized before the Second Hague Peace Conference. It suffices to cite this example to show what blunders are constantly being made by writers who do not see, or do not want to see, the difference between general and universal international law, who confound both, and who accuse on occasions a state of breaking a rule of international law which such state had in fact never recognized!

Just as care is necessary in the diagnosis of a customary rule asserted to exist by writers, so great caution must be exercised in the diagnosis of a *desuetudo* which makes a former customary rule of international law vanish and disappear, and in the appreciation of conventional rules which take the life out of former customary rules. Many a rule is still stated to exist by some authoritative writers which really is obsolete. On the other hand, writers sometimes teach that a rule has lost its validity, although it is still fully recognized. Take, for example, the rule that all states, whatever their size and degree of power, are equal before international law. Some writers maintain that this rule is no longer valid; that the political hegemony exercised by the great powers rests on a legal basis; that therefore states are not equal according to international law. Yet nothing of the kind is in fact the case. These writers simply confound political with legal equality. The rule of the legal equality of all full sovereign members of the family of nations will and must remain valid as long as the family of nations remains in existence, for this rule is one of the characteristics of the position of the states within the family of nations. The best proof that it is still recognized can be gained from the deliberations of the Second Hague Peace Conference where the votes of the politically most insignificant states had the same legal value as the votes of the great powers.

But however great pains a writer may take in trying to verify assertions of authorities, he will frequently not succeed, because either the material at hand is not sufficient to settle the question, or the necessary historical research is wanting, or for other reasons. He ought then to let the authorities fight their own case; he ought always to make it clear whether they are unanimous or disagree, what their arguments are, and the like. He will in particular have to investigate whether they make their assertion on the basis of the so-called law of nature, or on the basis of the observation of the actual practice of the states; and he will thereby be able to ascertain the real value of the assertion concerned. But however high his appreciation of all or of certain individual authorities may be, he must always bear the fact in his mind that authorities are not the law itself!

### XVII. APPRECIATION OF LAW-MAKING TREATIES

Whereas the importance of authorities is mostly overvalued, many writers are wanting in right appreciation of law-making international treaties. They refuse to law-making treaties recognition as a source of international law. They call treaty law "contract," and recognize as international law such rules only as are the outcome of custom. There is no greater sin of method than this! If this attitude were correct, then the Declaration of Paris, the Geneva conventions, the Hague convention concerning warfare on land, and other law-making treaties were not part of international law! Yet we see that these treaties not only create new rules, but take the life out of old customary rules, or extend them, restrict them, or partly alter their contents. Here, again, it is the neglect of the distinction between general and universal international law which is at the back of this detrimental attitude. It is true, a treaty can not make universal international law unless all members of the family of nations have become parties to it, and as long and in so far as this has not been realized the law which emanates from these treaties is only general or even only particular international law. Still, law it is and remains all the same while the treaties concerned remain valid. It is quite correct that in a sense every international treaty, be it ever so insignificant, is law-making. But it is understood that if we speak of law-making treaties we do not mean international treaties in general, but treaties of a certain kind only. Treaties in general are certainly only "contract," but law-making treaties are something infinitely more than this; they are acts of the powers in council which resemble in a sense acts of parliament within the boundaries of a state. They are, so to say, international statutes passed by the powers in council for their future international conduct. They are as binding upon the powers as customary international law is, and they gain more importance every day. The Hague peace conferences are certain to become a regular institution by automatically taking place in future from time to time, without being specially summoned by one of the powers. They will gradually settle more matters of international law, and the time will come when they will deal with the codification of international law at large. Customary international law will then be pushed into the background, although it will never entirely disappear. The future of international law belongs to conventional and not to customary law. But custom will always remain at the background of international law, just as it remains at the background of statutory law within the individual states. For the power of the states in council to make international law through law-making treaties rests as much on custom as the power of a municipal parliament to pass statutes does.

## XVIII. INTERPRETATION

The importance of law-making international treaties for the present and the future leads me to the discussion of another important point of method: Interpretation.

It is well known that hitherto no rules of international law are generally recognized concerning the interpretation of treaties in general. The rules of Roman law concerning interpretation as applied by Grotius and his followers are adequate rules on account of their common sense, but they are not recognized as rules of international law. The difficulties arising out of this condition of affairs are at present insurmountable, unless every case of dispute goes to arbitration. Take, for instance, the as yet unsettled controversy between America and Great Britain concerning the interpretation of the term "due diligence" in the three rules of Washington. Or take, to give another example, the meaning of the terms "cabotage" or "coasting trade" and of the "most-favored-nation" clause as applied in commercial treaties. Now, treaties in general are mostly treaties between two countries, but law-making treaties are agreements to which as a rule a great number, if not all the members of the family of nations, are parties. And the importance of these law-making treaties for international law is much greater than that of treaties in general, for the former supply daily more rules for the conduct of the states in their international affairs. It may be maintained that the whole institution of law-making treaties is to a certain extent in danger unless the science of international law succeeds in working out rules of interpretation which by becoming universally recognized enable a universally recognized construction of the treaties concerned. As yet nothing of the kind is in existence. The gap makes itself all the more felt as nearly all law-making treaties, from the Declaration of Paris down to the last Hague conventions, are the product of hasty and hurried compromises. Whereas most of the drafts of municipal statutes undergo a long process of preparation before they are laid before parliament, and are duly considered and examined before they are passed as statutes, most of the law-making international treaties which we at present possess were agreed upon at conferences without having been duly prepared a long time beforehand. The views of the different states represented at the conferences were hurriedly and superficially compromised. Terms of wide and ambiguous meaning were made use of. Gaps were intentionally left open because they could not be filled in without endangering the whole treaty concerned. Reference is made to the rules of customary international law on certain matters, although such rules are either controverted or do not exist at all. To a certain degree future conferences will have to work on the same lines, although the drafts will perhaps be prepared with greater care.

Now, how do the jurists of the different nations approach the difficulties of interpretation created by this hasty and hurried passing of law-making treaties? They do it armed with the rules of interpretation worked out by their municipal jurisprudence; possessed of those traits of mind which are peculiar to their race; imbued with their historical traditions and natural prejudices; applying their method of thought and feeling, which is different from that of other nations. Compare, for instance, the mental condition of an English jurist and that of a continental one who is called upon to interpret rules emanating from a law-making treaty. The continental jurist has gone through a course of training which has accustomed him to apply abstract rules of abstract codes; he always thinks in the abstract way, and his method of interpretation is therefore likewise abstract; he believes in principles and starts from them. The English jurist, on the other hand, has gone through a training which always makes him think in the concrete way; he starts from cases and tries to find out in what points a new case resembles the old ones; he mistrusts principles, and only believes in the characteristic traits of individual cases. If I may say so, the continental jurist endeavors to make his cases fit the legal rules, whereas the English jurist tries to make the law fit the cases. Or take a German and a French jurist called upon to interpret a law-making treaty. The German jurist, applying that exactness of method he has been brought up in, will, so to say, count, measure, and weigh the words contained in the treaty concerned; will think out the different interpretations which are possible; will select an interpretation which as far as possible agrees with the word, the letter, and the spirit of the treaty. The French jurist, on the other hand, will approach his task possessed of that *esprit* and full of that imaginative power with which his nation is gifted; he will try to find out the meaning of the rule in question by one glance; and if he detects several possible meanings, he will select the one which appeals more to his imagination, his sense of justice, and his predilection for the spirited and the ingenious.

Is it to be wondered at that under these circumstances and conditions the interpretation of certain rules of law-making treaties frequently differs among the jurists of different nations?

Now, to a certain extent these differences are and will always be insurmountable. Yet they do not, or should not, preclude the science of international law from in time producing at least certain rules of interpretation which are able to find universal recognition. What kind of rules these will be is at present impossible to say, but there can be no doubt that those few rules of interpretation upon which the jurisprudence of all civilized nations unanimously agrees will be amongst them.

However this may be, the science of international law must be on its guard to prevent the introduction — openly or surreptitiously — of such legal conceptions for the purpose of interpretation as are not common to the jurisprudence of the whole world, but are only known to the jurisprudence of one or another country. It can not therefore, to give an example, be considered admissible, although German writers do it frequently, to introduce the German conception of *Notstand,* in so far as its meaning goes beyond the meaning of the universally accepted conception of self-preservation in necessary self-defense. I will not deny that a legal conception belonging to the jurisprudence of an individual country might find its way into international jurisprudence. I should be sorry for the latter if it could not enrich itself with conceptions and ideas first arisen in the field of municipal jurisprudence. But before this can be done the conceptions and ideas concerned must be generally understood, adopted, and recognized. Therefore, if a law-making treaty should make use of such a conception there is no doubt that it has at once and *ipso facto* become naturalized. Just as technical terms of a certain language — think of the German "*Hinterland*" and "*Talweg*" — may be generally applied in international treaties and thereby become adopted by international law, so may municipal legal conceptions. Thus the English conception of "lease" has been introduced into international law by international treaties. But it can not be admissible to make use of such conceptions for the interpretation of law-making treaties, before this adoption has actually taken place.

Here, as elsewhere, much is to be expected from the International Prize Court agreed upon by the Second Hague Peace Conference and from the really permanent court of arbitration which a near future will establish. These courts will have to interpret some of the law-making treaties; they will have to work out rules of interpretation which will find general recognition. The fact that the members of these international courts will be recruited from different nations possessing different systems of law, and that these members will have to work together and will have to agree upon the interpretation of the law in question, will make these courts better fit to solve the problem than the science of international law is.

For the scholars of each nation work at this science possessed of their own bent of mind, and it is therefore not so easy for them to agree upon rules of interpretation as it is for those who do not work theoretically, but have to decide the cases as they arise in practice.

## XIX. ERRORS OF JUDGMENT THROUGH POLITICAL AND OTHER BIAS

I have a last sin of method to discuss, which is frequently committed by workers in the field of the science of international law: Errors of judgment created by political, humanitarian, or other bias. Many a controversy which is ventilated at greater or shorter length owes its origin to such errors of judgment. If the positive is the right method of the science of international law, we must endeavor to get rid of bias of all kinds. Let me enumerate some examples to illustrate my proposition.

Some French writers emphatically deny that subjugation is a mode of acquiring territory. Subjugation, they say, is a mere act of force which creates only a condition of fact and not of law; to turn this condition of fact into one of law, there is required the express or tacit consent of the inhabitants of the subjugated territory. Now, I do not deny that this opinion shows humane feeling, and that perhaps the time will come when subjugation as a mode of acquisition of territory will disappear. But to teach that this opinion corresponds to the law as it stands at present is simply a gross error of judgment created by an humanitarian bias.

Again, take the Monroe Doctrine. Whereas American writers assert that the two rules emanating therefrom are recognized rules of international law, European writers assert that these two rules contain violations of international law! It would, however, seem that both assertions alike embody gross errors of judgment created by political bias. I would say to the American writers that, as they recognize the equality of all states before international law, there is no reason why there should be one law for the acquisition of territory and for intervention on the American Continent, and another law for the same acts on the remaining parts of the globe. As far as international law is concerned, European states may acquire territory and exercise intervention as much on the American Continent as anywhere else. On the other hand, I would say to the European writers, that acquisition of territory and the exercise of intervention have, besides their legal quality, a political character. Vital interests may make it necessary and therefore admissible that other powers should intervene in the case of a contemplated acquisition of territory or of a dispute between two other states. The Monroe Doctrine is an expression of the principle that the United States considers it essential that, in the interest of the balance of power and the welfare of the American Continent, European states should not acquire any more territory in America, and that she should intervene in all serious conflicts between a European and an American power. The Monroe Doctrine is therefore not of a legal but of a political character; it is the guiding star of American politics, and there is nothing whatever in it which violates rules of international law.

Or, to give a third example, take the definition of war. There are plenty of writers who consider and therefore define war as the legal remedy of self-help to obtain otherwise impossible satisfaction for a wrong sustained from another state. Thus, they make war a legal institution. But they forget that many wars have been and will be fought for mere political reasons, for which wars the same rules of international law as regards warfare apply as for wars fought in self-help. By nevertheless defining war as they do they simply commit a gross error of judgment created by a political bias. They want to restrict the making of war to cases of wrong for which a state could not otherwise obtain satisfaction, and they confound therefore war in general with such cases of war as they consider from their own standpoint justified. If we look at war as history presents it to us, we must find a definition which fits all wars, whether just or unjust. War is not an institution established by international law as a means of self-help, but a fact of life for the occurrence of which international law provides a body of rules. And as a fact of life, war is not a legal remedy of self-help, but a contention between two states for the purpose of overpowering each other. I do not mean to say that the time will never come when there will be such wars only as are fought for the purpose of getting otherwise impossible satisfaction for a wrong sustained. But this time has certainly not yet arisen, and we must needs meanwhile define war in such a way as fits the facts of life.

I could enumerate many more example of such errors of judgment, but those cited suffice to show the necessity for the science of international law to avoid them. Yet our science will not succeed in this point, unless all authors endeavor to write in a truly international and independent spirit, and unless they make an effort to keep in the background their individual ideas concerning politics, morality, humanity, and justice. We must take the facts of life as they are and the rules of international law as we find them practiced in everyday life. Nothing prevents us from applying the sharp knife of criticism, from distinguishing between what is good and bad according to our individual ideas, and from proposing improvements. But we must not confound the facts of life as they are with what they ought to be, and we must not mix up the rules of international law which are really in force with those rules which we would wish to be in force. There is no better and quicker way to the realization of international ideals than to present the facts of international life and the rules of international law as they really are. For the knowledge of the realities enables the construction of realizable ideals, in contradistinction to hopeless dreams.

### XX. WORKERS TO BE IMBUED WITH IDEALISM

This distinction between the realities of life and law on the one hand, and, on the other, the ideals of the individual writer, brings me to the last word I have to say: Our method must certainly be the positive method, but it can successfully be applied only by those workers who are imbued with the idealistic outlook on life and matters. He who believes that the essential characteristic of law is the policeman who protects it is not properly fit to work at the science of international law, nor is he who has not a deep-rooted faith in the progress of the nations towards peace and civilization. International law is at present an unfinished and uncrowned system and building. He who has no faith in the possibility of accomplishing it is not wanted among us. We require men possessed of that idealism which sits down to historical research because it sees the present and the future in the past, and the past in the present and the future, although it does not confound them; which criticises the existing law for the purpose, not of pulling it to pieces, but of preparing its improvement and its codification; which believes in the good instincts of the masses and therefore helps to popularize international law in the hope of thereby improving international relations and working for the cause of peace. The science of international law has a great future to look forward to. Hundreds of hands are wanted to enable a future generation to start codification. And when this task is once achieved, hundreds of hands will again be wanted for the working up of the material supplied by codification.

No one of the present generation of international jurists will live when the codification of international law will be taken in hand. And when codification becomes an actuality, all our present books will lose their value and will go mouldy on the shelves of the libraries through not being read. But our work is nevertheless done for the future, for it must needs help to educate that future generation whose happy lot it will be to take codification in hand. Upon us and our work it depends whether, when the time for codification is ripe, there will be a generation of international jurists which is fit for the great work and which can achieve it for the benefit of mankind. The jingoes and the chauvinists of all nations may laugh at our work, and those narrow-minded people who can not see beyond their limited horizon may belittle our efforts. Ours is the faith that removes mountains, for our cause is that of humanity. The all-powerful force of the good which pushes mankind forward through the depths of history will in time unite all nations under the firm roof of a universally recognized and precisely codified law. And the words of the old prophets may after all in the end become true: "They shall beat their swords into plowshares, and their spears into pruning-hooks; nation shall not lift up sword against nation, neither shall they learn war any more" (Isaiah, ii:4).

L. OPPENHEIM.

# THE LEGAL NATURE OF INTERNATIONAL LAW

The recent article by Dr. Scott under this title in the October, 1907, issue of this JOURNAL is a most able presentation of the view that the rules which govern the relations of states to one another are as properly to be termed laws as are the legislative declarations of national law-making bodies. By quotations from the reported opinions of the highest courts of the United States and of Great Britain he shows that these tribunals have again and again declared that, when necessary for the adjudication of causes brought before them, they will take judicial cognizance of and apply the generally received principles of international law. This being so, Dr. Scott asserts it to have been judicially established that international law is law in the same sense that national law is, and that it constitutes an integral part of the municipal law of Great Britain and of the United States.

It is not the intention of the present writer again to attempt to defend that definition of the term "law" which limits its application to the commands of a political superior to a political inferior, of a sovereign to a subject. The effort will be made, however, to show that the English and American courts have not committed themselves to the doctrine which Dr. Scott ascribes to them. It is true that these courts adopt and apply established principles of international law, but in so applying and enforcing them they consider them as having been first impliedly adopted by the English or American State, as the case may be, as a portion of its municipal law. Thus, in fact, these principles are recognized and enforced, not as international law, but as municipal laws. In other words, while the principles which international laws embody are the product of international usage and agreement, their legal force as rules controlling the administration of justice between litigants is derived from the sanction of the state whose justice the courts administer, and by whose laws the courts themselves are created.

The adoption and modes of ascertainment of international laws by the courts are thus exactly analogous to the manner in which the judicial tribunals of the States of our Union determine and enforce nonstatutory common-law principles. Just as the private common law may be modified by statute (though this must always be expressly and not by implication), so Congress or Parliament has the full power to bind the courts by statutes which modify the generally accepted principles of international conduct. In the very early case of *The Charming Betsy* (2 Cr. 64), decided in 1804, it seems to have been accepted as a principle not needing argument that the court would be bound by an act of Congress providing a rule different from that laid down by international law, the only observation made being that " an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." In *The Nereide* (9 Cr. 388) Marshall again declares: "Till an act [of Congress] be passed the court is bound by the law of nations, which is a part of the law of the land." In Hilton v. Guyot (159 U. S. 113) the court say:

> International law in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation — is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination. The most certain guide, no doubt, for the decisions of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. Fremont v. United States, 58 U. S. 17 How. 542, 557; Sears v. The Scotia, 81 U. S. 14 Wall. 170, 188; Respublica v. De Longchamps, 1 U. S. 1 Dall. 111, 116; Moultrie v. Hunt, 23 N. Y. 394, 396.

In the case of *The Lottawanna, sub nomine* Rodd v. Heartt (21 Wall. 558), is set out in the clearest possible manner the extent to which, and the manner in which, any body of law not originally municipal may, by adoption, become such. That case had reference to the adoption by the United States of the general principles of maritime law, but, as is pointed out in the argument, the principle is the same with reference to international law. Justice Bradley, speaking for the court, said:

> The ground on which we are asked to overrule the judgment in the case of *The General Smith* is that by the general maritime law those who furnish necessary materials, repairs, and supplies to a vessel have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.
>
> The proposition affirms that the general maritime law governs this case, and is binding on the courts of the United States.
>
> But it is hardly necessary to argue that the general maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws, but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common law by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other; whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed — as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that in all essential things wherein those relations bring them in

> contact, there should be a uniform law founded on natural reason and justice. Hence, the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries are not one and the same in every particular; but that, while there is a general correspondence between them, arising from the fact that each adopts the general principles and the great mass of the general maritime law as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation which adopts it. And without such voluntary adoption it would not be law. And thus it happens that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common comes to be the common maritime law of the world.

The same principle which guides our courts in the adoption and enforcement of principles of international law is accepted by the courts of Great Britain, namely, the presumption that the state whose laws they apply has by the fact of its existence as a member of the family of nations accepted for its guidance in international matters the generally recognized rules of international law of procedure. When, however, as we have seen, the state has by treaty or statute, or otherwise, shown that it does not accept a given international-law principle, such principle does not receive judicial recognition.

A leading and often-cited English case upon this point is The Queen v. Keyn,[1] decided in 1876. The essential question involved in this case was whether by the operation of the general principle of international law which treats the marginal waters of a country as territorial the municipal court might, in the absence of any express statutory grant of power, exercise jurisdiction with reference to an act committed upon such waters. The court of last resort in its decision denied that the international law, however well established, could operate, *ex proprio vigore,* to extend the jurisdiction of a municipal court. In some way, it was declared, the assent of the state whose law the court is applying must be shown. International usage, participated in by the state in question, may show this assent; but it is the assent of the state and not the international usage which erects the principle into a law recognizable and enforceable by the courts.

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[1] Law Reports, 2 Exchequer Division, 63.

"To be binding," says Cockburn, C. J., in his opinion, "the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage — an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law, but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law."

By a law passed in 1878 (41 and 42 Vict., chap. 73) Parliament granted the jurisdiction which in Queen v. Keyn the court held itself to be without. The statement is sometimes made that the enactment of this law was equivalent to a parliamentary declaration of the erroneousness of the court's decision. This, of course, it was not. The preamble of that act does indeed declare that "the rightful jurisdiction of Her Majesty, her heirs and successors, extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom," but this legislative declaration necessarily extended only to a denial of the fact upon which the court had founded its judgment, and not to an assertion of the erroneousness of the *ratio decidendi* employed by the court. Indeed it does not need to be said that it is not within the power of a legislature, whatever the extent of its lawmaking powers, to control processes of judicial reasoning. It may lay down laws by which the courts will in the future be bound, and it may even provide principles of statutory construction which shall henceforth be followed, but it can not by any declaration render erroneous the process of reasoning which a court has employed. It may, for the future, with reference to specified matters, render inapplicable that reasoning, but can not render it erroneous as applied in the past.

As a matter of fact the English courts have continued to the present day to assert the doctrine declared in Queen v. Keyn. In the very recent case of the West Rand Contract Gold Mining Co. v. King (L. R. 1905, 2 K. B. 391) the Lord Chief Justice, in his opinion, says:

> The second proposition urged, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition

> in dealings between various nations. We adopt the language used by Lord Russell of Killoween in his address at Saratoga in 1896 on the subject of International Law and Arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding on them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants. For instance, Barbuit's Case, Cas. t. Tal. 281; Triquet v. Bath, 3 Burr. 1478; and Heathfield v. Chilton, 4 Burr. 2016, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield, when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts. The cases of Wolff v. Oxholm, 6 M. & S. 92; 18 R. R. 313, and Rex v. Keyn, 2 Ex. D. 63, are only illustrations of the same rule — namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

In Mortensen v. Peters, decided in 1906, the High Court of Justiciary of Scotland say:

> It is a trite observation that there is no such thing as a standard of international law, extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland.

In support of his position Dr. Scott cites the recent American case of *Paquette Habana* (175 U. S. 677), decided by the Supreme Court in 1899. This case involved the question whether, in the absence of municipal law, the principle that fishing smacks belonging to an enemy are not subject to seizure had become so well recognized in international law as to warrant the courts in declaring illegal a capture made by the United States naval forces. In its opinion the court say:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

After an exhaustive examination of precedents, and of views of commentators, the court say:

> This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.
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> The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.
>
> Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.
>
> This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

In a dissenting opinion by the Chief Justice, Justices Harlan and McKenna concurring, the argument is not so much a denial that the exemption of fishing smacks from capture in time of war is a practice generally sanctioned by modern practice and by the opinions of international law writers, as that it lies within the discretion of the executive power to determine the rigors of war, and that in the proclamation and directions which, in the exercise of that discretion, had been issued no such exemption had been expressly or impliedly authorized.

In this case we undoubtedly have the acceptance as law, by our courts, of an international usage, and that, too, one in whose favor neither universal and long-continued acceptance by nations nor unanimous advocacy by scientific commentators could be successfully urged. But this was by no means a repudiation of the principle declared by the Supreme Court in *The Lottawana* Case. The Federal Constitution provides that Congress shall have the power to define and punish offenses against the law of nations, and to make rules concerning captures on land and water. Furthermore, it is declared that treaties made under the authority of the United States shall be the supreme law of the land. The effect of these clauses which recognize the existence of a body of international laws and the granting to Congress of the power to punish offenses against them, the courts have repeatedly held is to adopt these laws into our municipal law *en blac* except where Congress or the treaty-making power has expressly changed them. Where, then, Congress has not acted, the courts properly hold that it is its intention that the generally recognized principles of international conduct shall be applied, in exactly the same way in which it has been held that with reference to the regulation of interstate commerce the silence of Congress is deemed equivalent to an expression of its will that that commerce shall be free from control.

There was, therefore, in this *Paquette Habana* Case that acceptance by the State which the courts have consistently declared is required for the transmutation of an international rule into a municipal command.

In conclusion it may be added, though the fact is of course well known, that our courts determine and apply principles of international law only in those cases where it is necessary to do so in order to adjudicate personal and property rights. Over all those questions which are of a purely political nature and involve the exercise of an executive or legislative discretion the judicial power does not extend.

W. W. WILLOUGHBY.

# NEUTRALIZATION

A Justice of the Supreme Court of the United States, who has inherited a taste for epigrammatic expression, made a notable statement on a public occasion not long ago. The learned Justice said that it was because the law is an arbitrary rather than a logical system that it demanded unquestioning obedience. Though the fact, or at least the mode of expression, may be challenged, it is certain that the foundations of legal principles and procedure seem far to seek sometimes, in absolute justice or in common consent, though upon the latter they must ultimately depend and though the former is their assumed foundation. The Roman law, which expresses the statutory grants of the ruler, and the common law, which maintains the claims and rights of the subject, though their appeal is to a final standard of righteousness, are not always discussed from the point of view of natural rights or innate principles of justice and morality. Indeed, should appeals be made upon such considerations the inference would not improbably be that the authors of them were not supported by accepted canons or acknowledged rules.

But, in approaching the matter of international law, which may be said to be in a formative state so that the question has been propounded seriously whether it can properly be called law at all, the discussion may be undertaken freely with some regard to ethical considerations. As a matter of fact, as international law has no authority to enforce its edicts and no appropriate punishments to inflict, some writers on the subject have rested the claim for its inclusion in jurisprudence, not upon the expositions of the science but upon the definition of the author of the Ecclesiastical Polity,

NOTE. — It is perhaps unnecessary to say that the views expressed by Mr. Winslow in his interesting article are personal and should not be taken as indicating either the policy or views of the AMERICAN JOURNAL OF INTERNATIONAL LAW. The reference to the JOURNAL and its readers in Mr. Winslow's last paragraph has suggested this statement. — MANAGING EDITOR.

the "judicious" Hooker, that law is "any rule or canon whereby actions are framed."

In dealing with the specific question of neutralization it is certainly proper enough to introduce moral and philosophical considerations. The subject and its relation to neutrality are very imperfectly apprehended. Even the terminology is confused in state papers and treaties, and few commentators have discussed the subject with clearness and accuracy. Neutrality, the state of being neutral and taking no side whatever with nations engaged in war, was hardly touched upon by the earlier writers who could not define that which was scarcely recognized at all. Grotius has no other name for neutrals than "*Medii*," and Bynkershoek calls a neutral "*non-hostis.*" Vattel, Wheaton, Halleck, Woolsey, Dana, the Lawrences, Phillimore, and many other authorities have made good progress, however, in elucidating the principles of neutrality.

Wheaton recognizes two types of neutrality — "perfect neutrality," which arises from the spontaneous attitude of the neutral state itself, and "imperfect, qualified, or conventional neutrality," which is the result of an agreement between the powers (constituting the act of neutralization). The latter has received but little expert attention. One critic asserts, indeed, that Wheaton's classification — in which Halleck follows him — can not be maintained, because the condition described in the second division might imply an agreement of the neutralized state made before the outbreak of war to do something inimical to one of the belligerents. Of course, Wheaton's "conventionally neutralized" state could never be supposed to contract obligations in time of peace inconsistent with its peculiar duties in time of war, to refrain from such obligations being an essential quality of neutralization.

The name of neutralization is loosely applied to the agreement made between the United States and Great Britain in 1817, to maintain a merely nominal force on the Great Lakes, and it seems inaccurate to apply the term to arrangements for the abstention from fortifying highways of commerce. The assent of the great powers of Europe — and of the United States perhaps, since the Geneva Conference (without protest from the smaller states) is essential to the neutralization of territory. It is this neutralization which seems the only measure that offers itself with an absolute and reasonable hope, according to the oft-quoted saying of Whewell, as "the true road to a perpetual peace."

The development of individual liberty within the state follows the settlement of public order. With a similar progression the individual nation now seeks, for the first time, the opportunity for itself which may be obtained through the established comity of nations. Hitherto, the neutralization of a state has been established, not primarily for its own advantage, but for the safety and for the benefit of its more powerful neighbors.

Such was the motive for Swiss neutralization. By the Treaty of Paris, May 30, 1814, the limits of France were re-established virtually as they had existed in 1792. By a separate and secret article of this treaty, the disposal of the territories renounced by France in the open treaty and the conditions tending to produce a system of real and durable equilibrium in Europe were to be decided upon by the allied powers among themselves. Thus, while the Treaty of Paris was made between France, Great Britain, Russia, Prussia, and Austria, the pacificatory and restorative measures were confided to the allied four great powers; France was to have no vote in the congress, which was convened by these powers in conformity with the secret article of the Paris Treaty. But when it assembled at Vienna November 1, 1814, the adroit audacity of Talleyrand and the disagreement of the allies secured for France a prominent position of influence. Eight powers actually composed the congress — Great Britain, Russia, Austria, Prussia, France, Spain, Portugal, and Sweden. Russia's claims upon Poland created a disagreement among the powers, as did the claims of Prussia upon a part of the same territory and upon the Rhine provinces. But the final act, which Spain alone refused to sign, was agreed upon June 9, 1815. The relations of Switzerland were determined by a declaration of the powers forming the congress, dated March 20, 1815, by the act of accession of the cantons of the same date, and by the final act. Switzerland by these acts and declarations was to take the relation of perpetual neutrality, and (in order to secure this end the better) a treaty with the King of Sardinia of May 15, 1815 provided that the Provinces of Chablais and Faucigny, south of Lake Leman, and all of Savoy north of Ugines, were to hold the same neutral attitude. Thus, Switzerland, Chablais and Faucigny and all Savoy north of Ugines were made neutral. This position of Switzerland, so constituted in 1815 for the sake of the peace of Europe, has never been changed and the other powers have always respected its neutrality.

Holland and Belgium were united by the congress. They were disrupted in 1830, and by the Treaty of London, April 19, 1839, between Holland and the five great powers — Great Britain, Russia, France, Austria, and Prussia — the Kingdom of Belgium was formed and the condition of perpetual neutrality imposed upon it. This condition was established in order that the Kingdom might be a barrier between the rivals, France and Germany. Its integrity has been preserved. It was threatened indeed during the Franco-Prussian war in 1870, when Great Britain immediately concluded two conventions — one between herself, Belgium, and Prussia, and another between herself, Belgium, and France — of which the conditions were that if France violated the integrity or neutrality of Belgium, Great Britian would join her forces to those of Prussia and, *mutatis mutandis,* that if Prussia were the aggressor, Great Britain would ally herself to France.

The Dutch United Provinces, with the larger part of the Austrian Netherlands, were constituted into a Kingdom of the Netherlands, under the Prince of Orange Nassau, including the Grand Duchy of Luxemburg and a part of the Duchy of Bouillon. The Grand Duchy of Luxemburg was added to Holland as an independent state, becoming a member of the German Confederation, and its boundaries, established at Vienna, were changed by the act annexed to the treaty of April 19, 1839. A part of the old territory of Luxemburg was taken from the Kingdom of the Netherlands and annexed to the Duchy of Limburg. After the disruption of the German Confederation in 1866, Luxemburg was garrisoned by Prussian troops. But owing to the remonstrances of France the matter was brought before a conference of the powers in London and by treaty of May 11, 1867, between Great Britain, Austria, Belgium, France, Italy, the Netherlands, Prussia, and Russia, the *status quo ante* of the Grand Duchy of Luxemburg was restored and it was made an open city (ville ouverte), while all the parties to the treaty agreed to respect its neutrality. Luxemburg, on her part, agreed to disarm and dismantle the frontier forts and all others within her boundaries, the provision of neutrality rendering them unnecessary. The city of Luxemburg was to cease being a fortified city, the Grand Duke of Luxemburg, however, being permitted to keep a stated body of troops for the police protection of his own subjects. Prussia agreed to withdraw all troops which had previously been maintained within the boundaries of Luxemburg. The Grand Duke of Luxemburg was to take all necessary steps, by virtue of his position as Grand Duke, to carry into effect the provisions of the treaty, and to convert the city of Luxemburg from an armed to an open city. In 1870, during the Franco-Prussian war, Prussia complained that France had violated the neutrality of Luxemburg. This caused much discussion and correspondence, but the treaty of neutralization was not, however, disavowed by Prussia. Since that time the neutrality of Luxemburg has been respected by all the powers.

Neutralization is not demanded to-day for the protection of the great powers from belligerent operations. The smaller and weaker states are demanding for themselves the privileges of neutralization, with the consequent relief from the dangers of aggression, intimidation, or annexation and from the heavy burdens of militarism. In our time these privileges and their guaranty are coming to be recognized as an individual and personal right of the state. Norway has secured for herself a partial, and is urging a general, neutralization. The subject is being agitated in Holland. Denmark has an active society for the promotion of the neutralization of that Kingdom, which has been so ably advocated by F. de Martens and other publicists, and a movement was made last year in Santo Domingo to instruct its delegates to urge its neutralization upon The Hague.

The greater the number of neutralized states, the more remote in a geometrical ratio, become the possibilities of war. The neutralized state itself renounces all idea of international contests. It exists essentially for the moral and commercial progress of its inhabitants. Such a state will be a strong advocate of disarmament and of arbitration. In fact, from a group of neutralized states would naturally proceed the formation of a permanent court of arbitration. Of course, the people of such states must put behind them those doctrines which it was supposed that the world, and the United States in particular, had well outgrown, that war and the preparations for war are essential to manly vigor, and that when the sword is turned into the plow share, mankind will necessarily become a race of effeminate weaklings.

The neutralized state is excluded from such sovereign functions only as concern war-making and its attributes, or which may in any way compromise the position established by international law as essential to neutrality. The surrender of these functions has no meaning to the weaker states whose reception of the great gift involves only a technical sacrifice of national dignity.

It is exceedingly important to make a careful discrimination between protectorates and neutralization or between limited neutralization of provinces, and that of an entire country, in view of many vague discussions of this subject which have exhibited a limited grasp of its true character. It is very common to quote the failure of the protectorate over Samoa as a warning against the association of powers to neutralize territory, and the lapsing of a joint Egyptian Protectorate is likewise sometimes quoted to the same effect. But as no state can be neutralized by its own *ipse dixit,* neither can the condition be created by action of two or three nations. As a matter of fact, a joint protectorate is less stable and therefore farther removed from the equilibrium established by general consent than the protectorate of a single nation by tacit consent of the other powers. The opportunity for jealousies and misunderstandings is so obvious that practical experience was hardly needed to demonstrate it, and, of course, the "protected" nation is unlikely to have any proper opportunity to develop its own powers as an independent state. It is universal consent which is the essential element of true neutralization.

The limited or provincial neutralization of a part of the territory of a state is likewise anomalous, and its non-success furnishes no argument against the fulfillment of the true ideal. The acquisition of Savoy by France in 1860, ratified by a plebiscite, broke that province away from the neutralized territories of Switzerland, of which it formed a part by the Vienna and Paris treaties of 1815, and although the French Government recognized that some limitations upon the rights of sovereignty still restrained Savoy by assenting to Switzerland's remonstrance against fortifications of the frontier, the guaranty of neutralization has not been maintained by the treaty powers.

It is doubtful whether the two Ionian islands, Corfu and Paxo, which were neutralized by the great powers when the group was transferred to Greece in 1864, are otherwise safeguarded than by the obligations assumed by the King of Greece. The city of Cracow and its territory was made a neutral state by the Congress of Vienna in 1815, under the joint protection of Russia, Prussia, and Austria, but it was claimed that the failure of Cracow to fulfill the obligations assumed by her, not to afford an asylum to fugitives from justice or military deserters, vitiated the conditions of the agreement and the city lost her liberty in 1846.

An important consideration, of course, is that a weak neutralized state may be unable to fulfill the responsibilities which are ordinarily attached to the position, notably to prevent a belligerent from using its lands or harbors or from making them a basis of hostile operations. In the method suggested, of converting the weaker nations into neutralized states, we must revert to the basis of what Whewell calls "international jus" rather than to any existing code of laws. It must be assumed that the state, being divested of all means of forcible resistance as is implied by her amicable attitude, is unable to resist such violations of her territory. It would not ordinarily be desirable that one great nation, by individual action, should intervene to control both belligerents, as Great Britain did in the case of Belgium previously mentioned, for the association of the neutralizing powers implies that though two or more might be engaged in war, they are all enlisted to preserve the sanctity of the contract, irrevocable, except by general consent, to maintain inviolate, as against any one or any group of them, the neutralized territory. The establishment of this attitude implies a permanent comity of nations to maintain the peace, at least in neutralized territories.

As in the limit as to time afforded by the Truce of God, or like that which was vainly attempted by the Vatican, to give pause to the impending war between the United States and Spain, so the limit placed by territorial lines must exercise an important influence upon the forces which make for war. If the whole movement toward the establishment of international law is based upon the progress of humane and moral ideas, it is no mere chimerical aspiration to regard as hopefully possible the largest increase of its sanctions in this direction. Every year in which the great powers stand associted, even though prompted at first by mutual jealousies, as sponsors for the peace of portions of the world's territory, the more firmly established is the precedent, crystallizing into a rule of international law, that a state once neutralized must so remain. That the great powers, whatever temporary disturbances may arise between some of them, would all stand together, for the guaranty established by them all in perpetuity, thus becomes more and more probable. It is easy to see what an important influence may be exerted upon warlike motive by this underlying and common pledge of a protected peace, growing deeper and stronger as the spheres in which it prevails become larger and more numerous.

That objections by neighboring states, and perhaps in other quarters, may be raised to the neutralization of territory is conceded, but it is perfectly obvious that these objections have proceeded from selfish and narrow motives and may disappear with a larger political consciousness, which looks to the reign of peace and of law. In a movement so important it is not discouraging that the wheels of progress seem to move slowly and that a long educational period precedes definite action, but it is strange that peace congresses and conventions have not devoted themselves more strenuously to the promotion of the subject. It was referred, several years ago, for consideration to the Berne "Bureau International Permanent de la Paix," but no report has been made upon it. Perhaps it is more hopeful, after all, that the plan is developing itself practically among the working forces of the nations rather than in the counsels of the professional reformers.

The most interesting aspect of neutralization, however, is its application to the undeveloped nations, the people of the East and of tropical countries. National consciousness is awakening through the general progress of enlightenment, and especially under the impulse which has followed the entrance of Japan among the world powers. In the Philippine Islands we are daily fostering it by an extensive educational system. The movements and the demands of commerce and industry in the present conditions are inflicting heavy and still heavier burdens upon the dependent peoples whose interests are often ruthlessly sacrificed to the requirements of exploitation. It is difficult to believe that this growing national consciousness and the desires and ambitions which accompany it will long be content with control by any sort of foreign rule.

Is it not the part of those who make a study of international law to anticipate and to provide for that extension of it which may furnish some orderly and methodical system for the transition of possessions, dependencies, and some of the colonies to the self-governing attitude which, before long, will be claimed by those now living under more or less enforced tutelage? One eminent authority at least, Sir Thomas Barclay, in his recent valuable monograph "Problems of International Practice and Diplomacy," observes:

> Might it not become a principle in the public law of Europe, following more or less on the lines of Articles X, XI, and XII of the general act of Berlin of February 28, 1885, that any nation or self-governing colony shall be enabled, on fulfilling certain conditions, to claim neutralization?

Sir Thomas Barclay even provides a scheme for "a form of agreement as to the proclamation of neutralization."

A famous divine, whose interpretations of Christian principles seem to be based on the exegesis of the Scripture text that their fruit "is not peace but a sword," was a statement of justifiable action instead of a prophetic warning, has thus summed up the matter. He asserts that the "civilized" peoples, who are alone fitted to develop and expand the resources of nature, are the "ox" which is entitled to the manger and to its contents and from them the heathen "dog," if he is in the way, should be forced to retire. Unfortunately, these "civilized" people of the temperate zones, although able to plan methods of administration and development, are unable themselves to perform the manual labor demanded, which, if it were not climatically impossible for them, would be altogether too expensive. Thus, in the pressure for rapid development, the native inhabitant must either perform the necessary labor at the price which permits a profit to his "benefactor," as it is customary to call his owner, or he must go to the wall. The alternative is, of course, that the peon or the coolie is imported to perform the work demanded.

Much has been said of the excellent administration of Siam and the Straits Settlements. Yet it is the fact that by imported labor the natives are almost completely shut out from industrial opportunity. In South Africa this menace has aroused remonstrances which have moved the British Government to efforts to restrain the introduction of foreign labor at the expiration of engagements already entered into. Jealous as the great nations and their colonies are of the entrance into their territories of such labor as the Chinese and other alien races supply (even rigidly excluding, as is done by the United States, the entrance of any form of it under contract) the weaker peoples have been subjected to the competition of imported labor almost without restraint. We should prepare for the day when the ægis of international law may be so extended as to protect the nations, as their protest makes itself heard, who are suffering in a manner that must otherwise lead to their final extinction.

It is true that some generous and voluntary guidance might be beneficial and might even be sought by the weaker peoples in their national evolution. But this should be given beyond the sphere of international law, whose function is to protect them from and prevent that kind of interference which tends to crush the national life. Before the establishment of those maxims and rules which have developed with the growing comity of nations, the stronger was free to conquer the weaker, to destroy its property and to slaughter its people. While recognizing the advance toward a better day, is there such an advance in the actual state of the relations between the more powerful and the weaker, under the guise of a benevolent trusteeship, as might have been anticipated? We are fully aware, to be sure, that the scientific process of evolution which demands the survival of the fittest might seem to be retarded by an effort to strengthen and support the feeble among the nations. Who shall decide that any race of men has no capacity to use, no value in the scheme of the universe? While progressive philanthropy and all the beneficent influences which are commonly denominated Christian and the institutions of jurisprudence themselves do not hesitate to defy, in the case of the feeble individual, the scientific theory; its dictum is not likely to hinder the growing demand for a similarly benevolent treatment of the affairs of feeble nations.

Neutralization would recognize the individual right of the nationality to its own existence and to its own progress, though that progress might be less rapid than expected by the civilized world, and certainly much slower than would be desired by the greed of the exploiter. It is for the law of nations, like the ordinary laws of society, to recognize, to respect, and to secure individual liberty. Slavery only knows no law. The whole theory which has prevailed hitherto under the name of trusteeship implies the assumption that the beneficent influences of civilization could be extended only through the form of ownership, without which no moral, social, and commercial influences would exert any considerable effect. With such an object lesson as Japan before its eyes, the world can hardly deny that the growth and development of self-government is possible without ownership, guardianship, or protectorate. Had Admiral Dewey sailed away from the Philippine Islands as Commodore Perry sailed away from Japan, another national life in the East, with a proper security, might have grown well towards an acknowledged maturity. Had neutralization been established then in the Philippines and its conditions obtained thereby a wider recognition, Japan in her turn, needing restraint rather than protection, might have been impelled to join in guarding the nationality of Korea instead of taking a free hand to destroy it.

Of course it is not to be expected that the land hunger of the more densely populated countries will soon be removed by an out-flow of emigration to independent countries, or that the great nations will very willingly part with their colonies and possessions. But may not a time come when there will be recognized the freedom of individuals to go to places where their labor is needed and where they can be assimilated, subject only to the control of their hosts, the natural owners of the soil? National barriers are but a hindrance to the free movements of persons, as they are to the exchange of articles of commerce, and the recognition of the rights of humanity beyond the limits of nationality will really tend to strengthen rather than to weaken the nations. The experience of the world has proved that though colonial enterprise may have been profitable to a few individuals and a limited number of interests, it has been prejudicial rather than advantageous to the parent country. Friendly alliance and free commercial intercourse are of mutual benefit and the phlebotomy of emigration has relieved the nation which is suffering from the plethora of a congested population, while it has assisted and stimulated the development of sparsely settled states.

It is obvious that the unrest which manifests itself in the subject state, however diplomatically it may be met, is unlikely to be allayed. The demands of Egypt, of India, and of South Africa are sure to become more and more insistent. In fact, the ruling state, even if not forced to relinquish its control through sheer financial and physical inability, will probably be obliged before long to conform to the growing sense of justice among its own people and to take measures to set adrift its ambitious dependency.

Lord Kitchener and Lord Cromer may continue to defend the policies which have been built up with so much civil and military energy, unable to see beyond the limits of their own spheres of action. The new school of thought in England is recognizing, however, even though it may not yet generally welcome, the possibility of freeing its subject peoples. When the time comes for their graduation into the ranks of self-governing nations, since they can not have sufficient strength for defense, obviously the parent nation could hardly fail to see that they were given proper protection. How could this be so adequately effected as by a request to the other powers that they should join with it in the establishment of a permanent neutralization for the new state? Of course this does not imply a severance from the world at large in those ways in which the interests of commerce, missionary zeal, the spirit of humanity and international brotherhood exert themselves, without regard to definitions of sovereignty. It may be conceded that it is as true of philanthropy and Christianity as it is of trade that they do not "follow the flag." Individual service would not be wanting where it was needed, like that which Gordon gave in China and which has been rendered to many another nation by less well-known lovers of their kind, neither for greed, ambition, nor love of power. The brotherly love, such as Stevenson manifested for his Samoans, would never be found wanting though the clamors of selfishness were silent when the need for help made itself heard.

Are we to suppose that all the beneficent influences that are now being exerted in the Philippines, for instance, are being done for pay or from national pride? that Bishop Brent and all his fellow-workers would cease their efforts if the Philippine Islands were to be made a neutralized state? From the evidences given by the inhabitants during the period of the government at Malolos, it is obvious that eagerness for such help was latent there and that it was eagerly welcomed and supported. It can not be forgotten that officers, captured from our army during the war of defense conducted against the United States by the Filipinos, were paroled and hired to teach in the native schools.

The basis of the idea of neutralization as applied to the weaker peoples, of course, rests upon a confidence in self-development and is a direct outcome of true democratic principles. It is to be believed that in spite of temporary downward curves these principles are, on the whole, making a continued upward progress. It is undoubtedly true, as has been said, that, waiving its effect upon the native inhabitants of the soil, material progress is more rapidly stimulated by the sovereignty of the more developed nations. An indefinite rapidity of development is, however, not altogether desirable, as is evidenced by the recurrence of the financial and commercial crises which we call panics. Fostered by artificial trade regulations and the ingenuity of great financiers and captains of industry, feverish periods of speculative activity are followed by the cold fit in which the patient shudders in despair; and a great recession takes place from the over-hasty advance. The lesson which the world is gradually learning from the results of intense and hasty greed, far over passing the benefits which its enterprises are supposed to bestow, would be reenforced by the example of independent states pursuing their course under methods which lack the intemperate fervor of Western exploitation. It is undoubtedly true that the people of tropical countries, unaffected by the influence and example of the energetic residents of the temperate zone, might have rested content with their easy opportunities for procuring the simple necessaries of life. If peoples thus conditioned were to have been allowed to enter the family of nations by such a process as neutralization, they would probably have remained satisfied with the exchange of such natural products as their lands afforded for the few articles required to supply their needs, manufactured by nations of a higher development. But, as the matter presents itself to-day, contact with the world has planted the seeds of ambition among these peoples. Their needs and their desires are increasing with the growth of national consciousness and their movement towards independence. Such countries could never supply the field or offer an opportunity for large manufacturing enterprises and there would, therefore, be no inducement for them to erect tariff walls. The effect upon the equilibrium of trade would be indisputably excellent; a natural export consisting of local products, and an import, to a moderately increasing degree, of the products of manufacture required by the growing wants of an advancing civilization.

We have in the United States some continuing faith in what is popularly called the Monroe Doctrine, which, from whatever motive it was established, secures to the states of the South American continent conditions which may in a sense be called those of neutralization. But besides the fact that the intrusion of the United States into the Eastern Hemisphere has undermined the foundations of the doctrine in the view of many authorities on international law, no assertion of such guaranty as the Monroe Doctrine is supposed to furnish should be given by any single state. This guaranty by a single state can not be viewed as a world-peace measure. In fact, it may easily be provocative of war. The great rival powers, each maintaining that it alone is the true arbiter of peace and that its sovereign will should be the supreme arbiter in cases of difference and dispute, are competing to lead in military and especially in naval strength. The United States has not only to maintain force sufficient to defend its possessions in the other hemisphere, but to guard against aggressions upon its own home territory and upon the whole South American continent. So far as neutralized territory is concerned, a certain quantity of naval force which some power or other might have to maintain in its defense as a " possession " would be released or could be converted to police duty. In the ideal conditions of international law and practice, a small union navy for this police duty of the seas would be the substitute for the futile and wasteful expenditures of our menacing naval armaments.

It is possible, of course, that a neutralized nation might fail to develop any kind of orderly government for a long time, and that there might be violence and bloodshed and that the government established, more or less permanently, might be an oligarchy or a despotism. But here, again, is an opportunity for patience and for the historical memory and for the contemplation of such examples as that of Mexico, which has won its way to an orderly and generally satisfactory administration through chaos and excesses of every kind. The free will of nations is as respectable as the free will of individuals. We do not attempt to restrain the liberty of the individual even though we think he might be governed infinitely better by others than he is able to govern himself, unless he interferes with others' rights and liberties. Naturalization recognizes the free individuality of the state and that its affairs should not be directly controlled by foreign nations or indirectly controlled by them as is the case when the burden of militarism is laid upon it by its liability to attack. The present situation may not be inaptly compared to that which would exist if the protection of the law exerted by common consent were removed and the weaker individual, who could not protect himself by his fists, were forced to go about armed to the teeth to defend possible assaults upon his person.

No discussion in the United States of the subject of neutralization can be made without recalling the fact that at the first participation of this country in the counsels of the great powers Mr. John A. Kasson, in her behalf, at the Berlin West African Congress, urged the neutralization of the territories comprising the conventional basin of the Congo. The congress, although deeply impressed by Mr. Kasson's arguments, refused to enter into a compact which might, in case of war, deprive the belligerent of the means of attack, although a recommendation was adopted that the parties which might be concerned in a future act of war should establish and respect the neutrality of these territories.

At this moment many publicists have suggested the plan of neutralization to be applied to the Philippine Islands when the independence which is contemplated for them on all sides shall come to pass. Whether this independence is granted at the end of five years or ten years or at a time beyond the life of the present generation, it will be necessary in some sort to provide for the undisturbed preservation of the national life. The idea of neutralization was propounded by Mr. James G. Blaine more than a quarter of a century ago, when in 1881 he made the statement in behalf of the Government of the United States: "It firmly believes that the position of the Hawaiian Islands as the key to the domain of the American Pacific demands their benevolent neutrality, to which end it will earnestly coöperate with the native government;" and it was only as an alternative that the astute statesman added that "if, through any cause, the maintenance of such a position of benevolent neutrality should be found by Hawaii to be impracticable, this Government would then unhesitatingly meet the altered situation by seeking an avowedly American solution for the grave issues presented." Had the perpetual neutralization of the Sandwich Islands been established by the consent of all the great powers, the first step might not have been taken in a direction which is still regarded very much as it was regarded when Mr. Fish wrote in 1873:

> The acquisition of territory beyond the sea, outside the present confines of the United States, meets the opposition of many discreet men who have more or less influence in our councils.

Mr. Edwin Burritt Smith many years ago, in the early days of their struggle for independence, urged the neutralization of the Philippine Islands. At a later date Mr. John Foreman, who has made many valuable contributions to the discussion of Philippine affairs, declared that if, when she "destroyed the protecting power of Spain in the Philippine Islands, the United States had practically said to the Filipinos: 'You are henceforth a free people; work out your own destiny. For no nation which has become great was ever made; it made itself. We will from this moment endeavor to persuade all the great powers to join us in declaring your independence and neutrality' — if that had been America's attitude, then the world would have hailed such unprecedented mutual self-abnegation, and the powers might probably have agreed to America's proposal."

In an able argument before the Committee on Insular Affairs of the House of Representatives, April 6, 1906, in support of a joint resolution introduced by the Hon. Samuel W. McCall in the House January 4, 1906, Mr. Moorfield Story said:

> When the islands were taken the argument was that it was necessary to do so in order to prevent them from being taken by some other power. That argument did not impress all of us, but it impressed a great many people of this country very much. And we see it constantly brought forward now as a reason for retaining the islands. We cannot afford to let them go because some other power would take them.
>
> This resolution aims to remove that obstacle from our path, and the feeling which prompts it is that we should be at liberty to deal with the Philippine Islands as we think proper. The question of their government — the question whether they should receive their independence or not — is a question between us and the Filipinos, and it is not a question which legitimately interests any foreign power. In deciding that question we should be able to deal with it as we think best. If we conclude to give the Filipinos independence, we should be in a position to do so when we think proper, but not to have our judgment coerced by the fact that some foreign nation is liable to interfere if we decide in a certain way. This, therefore, is a resolution which is intended to free the hands of the United States and leaves in its entire control the situation.
>
> That it is feasible to obtain such an agreement is, I think, hardly doubtful. In the first place, if we ask the powers of the world to make this agreement with us, we are not asking them to give us anything. The Philippine Islands in their eyes now belong to us. They are not

subjects for foreign aggression. To interfere with them means war with us, and that is what no foreign power is at present seeking. Therefore, when we ask them to agree, that we decide that it is proper to give the Filipinos their independence, they will keep their hands off. We are asking them to give nothing.

The request, if made now, is made at a peculiarly favorable time. There never was in the history of the world a time when the friendship of the United States was so much desired by everybody as it is at this moment. There are many of us who come down from a former generation who remember the time during the civil war when the relations between this country and England, this country and France, this country and Germany, were strained; when we felt that we were constantly living under the shadow of their interference in our affairs; when the greatest service that could be rendered was to persuade them to keep their hands off; and the feeling in this country against those nations was extremely bitter. But to-day Japan certainly wishes to coöperate with us, and she recognizes the friendship that we have shown her in the recent war with Russia. Russia would be anxious to be our friend if possible, and a reformed Russia will find us warmly her friend. Germany has shown her desire to be friendly with us by her recent action about the tariff. France and England are certainly each anxious to preserve their present relations with us; and if this country were to ask them simply to make this agreement, I am perfectly certain that there would be no objection. If we said that we wanted this thing we should get it.

Moreover, what we are dealing with, that which we are afraid of, is not so much the anxiety on the part of any foreign nation to take the Philippine Islands because it wants the islands, as it is the fear that one nation may take them in order to prevent another nation from taking them. England once owned and controlled these islands, but she let them go voluntarily. Spain owned and controlled them, and, I fancy, was very glad to get rid of them. Certainly the figures show that her prosperity since we have had her colonies is much greater than when she had them. Our own experience with them has not been such as to make other nations regard them as a peculiarly tempting morsel. Probably if England should be assured that Germany would not get them, and Germany that France would not get them, and France that no other foreign power would get them, they would be glad to agree that those islands should become independent. They would be protected by an international agreement against their being absorbed by any rival.

If the neutralization of weaker peoples be, as has been maintained, a great advance upon righteous lines toward the development of humanity and a very hopeful and practical step toward the realization of the ideal of world peace, the opportunity afforded to the United States by its anomalous relation to the Philippine Islands is a great and unique one. Another resolution looking to this step was introduced during the last session of Congress in the House of Representatives by the Hon. George F. Burgess, of Texas, and in the Senate (by request) by the Hon. Winthrop Murray Crane, of Massachusetts. Mr. McCall reintroduced his resolution on the first day of the present session and the Hon. John Sharp Williams, the leader of the minority, has proposed a resolution urging neutralization as a protection for the independence of the Philippines, which it contemplates. Senator Stone also incorporated the plan of neutralization in a resolution presented February 5, 1908, requesting the President to deliver the control of the islands to the authorities representing the people thereof on December 10, 1913. In view of the commercial results of its connection with the archipélago and the present burden imposed upon the national treasury for the government and support thereof and the enormous expense of its proper military and naval defense, the gift of independence protected by neutralization could hardly be considered a "self-denying ordinance" on the part of the United States.

It may not be inappropriate to make citations from an address delivered by the Hon. Albert E. Pillsbury, formerly attorney-general of Massachusetts, at a meeting held in Faneuil Hall, Boston, last November, to discuss the subject of neutralization of the Philippine Islands:

> The proposed neutralization means that the United States shall invite the principal powers to join with it in a treaty agreement, setting the islands apart from conquest and binding the inhabitants to abstain from offensive warfare, with a recognition, and, if the usual practice is followed, a guaranty by the contracting powers, of their independence whenever conceded by the United States. In short, neutralization means that the islands shall not molest nor be molested by any other power, and that the nations will recognize and protect their independence whenever they are made independent. * * * Neutralization of the islands probably can be effected without committing the United States to their final independence, at all events at any fixed date, and as this avoids one of the first objections which will be raised against the project, the fact ought to be noticed. In this view, neutralization invites the approval alike of those who supported and those who opposed our

acquisition of the Philippines. It affords a common ground on which imperialists, if there are any, and anti-imperialists can meet, as it carries advantages to the United States in dealing with the Philippines, apart from the question of independence, which are so plain to the commonest understanding that all alike must recognize and admit them.

The great merit of neutralization, appealing alike to people of all views upon the Philippine policy, is that it clears the path of the most formidable difficulties in the way of working out, to whatever result, the problem that confronts us there. Some advantages at once to be gained by it are apparent at a glance.

It permanently removes the islands from the theater of war; a sufficient end in itself, if there were no other.

It thus relieves the United States from the necessity of maintaining a great naval and military establishment in order to be prepared at all times for their defense.

It avoids the first and chief objection always urged against independence — that if given their freedom, the islands will at once fall a prey to some foreign power or powers. * * * These islands, from their situation, are peculiarly subject to naval power. The greatest navy can at any time take and possess them. They may be wanted by that rising power near to whose doors they lie, and how long do you think we could defend them against Japan? I do not suppose the United States will ever abandon them under fire or under threats, unless compelled to, but a war for their defense, if we can believe the American people capable of such a folly, would be a national calamity and it might turn out a national disaster. The time to avoid it is before we become involved in it, and it can be avoided by neutralization. * * *

It will be objected that neutralization will deprive us of any naval base or military station in the Philippines. This does not necessarily follow, but if it should, neutralization will avoid the necessity of defending the islands themselves, and for any other legitimate purpose we probably need a naval base in the Philippines no more than we need one at the north pole.

Another objection will be that neutralization will necessarily open the islands to the trade of all the nations on equal terms, involving the abandonment of any special advantages for our own. The mercenary hope of profit, though unquestionably it has had much to do with our taking and keeping of the Philippines, has proved to be and will continue to be a delusion. Put the profits of our trade in nine years, or any prespective profits, against the hundreds of millions which we have already paid for the luxury of Philippine dominion and the hundreds of millions yet to be paid if we stay there, and there will remain no more of this objection.

It may be that neutralization will involve compensation or some form of indemnity to capitalized interests which may have been developed there on the faith of our own control. I do not know whether this is so, but if it is so it is only a question of expense, a bagatelle in comparison with the unavoidable cost of maintaining our possession.

Against all these objections, and, as I believe, against any which can be urged to neutralization, the exemption of the islands from war, relieving the United States of the perpetual burden of an armament for their defense is, by itself, far more than a compensating advantage.

In discussing the connection of the United States with the Philippine Islands, Lord Curzon, in a recent address, made an interesting reference to the state of American opinion. He said that if a popular vote could be taken in this country upon that connection "a large and possibly an overwhelming majority would be against it." But while the British statesman recognizes the growing imperialistic burden, he dreads to lay it down and can not bring himself to contemplate the possibility of the desertion of the United States from the policy of expansion. So Lord Curzon goes on to predict that, however the American people might deplore it, "no President and no Congress will take steps to relieve the situation." Lord Curzon has not been well informed as to the authoritative declarations of purpose made in the United States concerning the archipelago.

This is not the place to advocate any purely political measure. The rehearsal of the conditions in the Philippine Islands and some comment thereupon is not inappropriate, however, to the discussion of neutralization. A great nation, having obtained sovereignty over an alien race, has distinctly declared through its executive officials its purpose to prepare that race for self-government and entire independence. When that preparation is accomplished, neutralization of the territory of the people to be enfranchised, as a gift from the abdicating sovereign, would seem to be only a proper complement to the grant of self-government and independence, and would be necessary indeed to make it effective. Whatever notion may be entertained concerning the proper course to be pursued in regard to the territory, the members of the society represented by this Journal, as such, would be profoundly interested in a disposition of the Philippine Islands, involving a novel and impressive appeal to the principles of international law.

ERVING WINSLOW.

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# EDITORIAL COMMENT

## THE AMERICAN THEORY OF INTERNATIONAL ARBITRATION

The United States has been and is a partisan — we might almost say a violent partisan — of international arbitration. In times past it has submitted individual cases to arbitration and has expressed a willingness, indeed a profound desire, to bind itself to submit all cases susceptible of judicial treatment, and of a nature to be submitted, to international arbitration. Various general treaties of arbitration were negotiated in 1904 and were ratified by the Senate of the United States, with an amendment, however, which required for the establishment of the *compromis* the conclusion of a treaty. This would necessitate, therefore, the negotiation of an individual treaty in order to submit a question to arbitration which the contracting parties had already bound themselves to submit. There would be thus involved the delay incident to the conclusion of the treaty, and the exchange of ratifications would necessarily prolong the delay. Under these circumstances it was deemed inadvisable to submit the treaties as amended to the various powers for their ratification. It is doubtful whether the powers would have been willing to ratify the amended treaty which carried with it the obligation to conclude a treaty to carry it into effect when the very purpose of the original treaty was to bind the respective countries to submit questions to arbitration without further recourse to the treaty-making power. The theory of the European governments is that the general treaty obligates the contracting parties to submit the questions specified in the treaty to arbitration and that the formulation of the *compromis,* however important it may be, is a question of procedure. The duty created by the general treaty thus obligates the power to submit the individual question to arbitration and the duty created by this treaty becomes a mere question of procedure which the contracting parties may arrange diplomatically without further resort to the treaty-making power, for the general treaty clothes the national organ with the necessary powers to give effect to the international agreement embodied in the general treaty. In the United States, however, the President and the Senate constitute the treaty-making power and the cooperation of both these is necessary to bind the United States internationally. The difficulty with the United States is, therefore, a constitutional difficulty, and a treaty to be operative and binding upon the United States must permit the United States to formulate the agreement according to our laws. The difficulty, therefore, as far as we are concerned, is internal, and it would seem that foreign powers have no more right to object to the particular manner in which the *compromis* is established, provided only it be established, than the United States would have to object to the formulation of the *compromis* in a particular manner by a foreign power. The duty to formulate the *compromis* is, by virtue of the treaty, international; the means by which it is established are internal, and international law stops at the frontier. It would follow from this statement that if the establishment of the *compromis* involved the treaty-making power of the United States we should not, in order to solve our internal difficulties, require a foreign power to resort to the treaty-making power if that foreign power is competent to conclude the *compromis* by simple administrative action. The Senate amendment of 1904 providing that the *compromis* be a special treaty seems, therefore, objectionable; for it compels a foreign power to negotiate a treaty when by the internal organization of the foreign power in question a formal treaty is unnecessary. Therefore, Secretary Root is to be congratulated for devising a simple expedient by which the constitutional difficulties of the United States will be satisfied without requiring a foreign power to negotiate the special treaty for the submission of the individual case to arbitration.

An objection frequently made to the cooperation of the Senate in the establishment of the *compromis* necessary for the submission of the case is that a foreign power is bound by its general treaty to negotiate the *compromis,* whereas the United States is not bound; for the agreement upon the terms of the *compromis* binds the foreign power, whereas the United States is not bound until the Senate has ratified the special agreement. If this objection were well founded it would indeed be serious, but as the *compromis* is established by diplomatic negotiation it is merely an offer until it is accepted and may be withdrawn at any time before acceptance. If Germany, in accordance with the provisions of a general arbitration treaty, formulates and presents to the United States a *compromis,* this is, in the language of private law, an offer, and if the ratification of the Senate is necessary it does not become binding on Germany until the Senate has ratified it. A treaty may be negotiated between Germany and the United States, and may be signed by Germany, but it would be absurd to suppose that Germany is bound by the treaty unless and until it is ratified by the treaty-making power of the United States. Neither party is bound unless both are. Regarded in this light, the proposed *compromis* is not binding upon Germany until the treaty-making power of the United States has signed and ratified it, and until this has happened Germany is at liberty to withdraw its offer. It may be that it is easier for Germany to formulate the *compromis,* but the ease or difficulty is not the point at issue. The question is that neither party is or can be, in the nature of things, bound until the other is. It may be that the cooperation of the Senate involves delay, but this naturally exists where the agent is forced to consult the principal. If the *compromis,* therefore, be looked upon as a simple case of offer and acceptance, no legal difficulty arises, although delay may be caused by the necessity of consulting a branch of the Government other than that which negotiated the agreement. The convention between the United States and France, signed on the 10th day of February, approved by the Senate on February 19, and ratified by the President on the 27th of February, 1908, may be considered as a model treaty, and it is hoped that it will be the first of a long and increasing series.

Turning to the discussion of the various articles of this convention, it will be seen that the Contracting States have adopted the general formula of international arbitration, in which questions involving vital interests, independence, or the honor of the two Contracting States, as well as questions affecting the interests of third parties, are excluded from the scope of the treaty. It may be that nations will one day agree to arbitrate questions concerning their vital interests, independence, or honor, but at present they are either unwilling or unable to do so. In the meantime, there is no reason why they should not arbitrate differences of a legal nature or those relating to the interpretation of treaties between the contracting parties which have not been settled by diplomacy. Article 1, which is fully abreast of the enlightened public sentiment of the present day, is a follows:

> Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, should be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.

Article 2 consists of two sentences, the first of which provides that the *compromis* — that is to say, the special agreement — shall be established before an appeal is made to the Permanent Court of Arbitration. The exact wording of this is as follows:

> In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure.

The second sentence of the article in question provides how the *compromis* shall be made. For example:

> It is understood that on the part of the United States such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate, and on the part of France they will be subject to the procedure required by the constitutional laws of France.

An analysis of this simple clause shows that the *compromis* is to be made by the President of the United States by and with the advice and consent of the Senate, but does not state, as in the treaties of 1904, that the special agreement is to be a special treaty. The President negotiates the *compromis* and submits it to the Senate for its advice and consent. The approval of the Senate binds the United States, and the agreement upon the issue thus determined is ready for submission to the Court of Arbitration. Until the approval of the Senate is obtained the United States is not bound, and in like manner France is not bound until the procedure has been complied with required by the constitutional laws of France. When this procedure has been complied with the *compromis* is established by France. Both parties are thus bound, and until both are neither is. This expedient is as simple as it is wise, because it frees each President from the responsibility of determining whether the vital interests, the independence, or the honor of the Contracting States is involved, and by associating the constitutional organs of each State divides a responsibility which at all times would be grave and which at times might be oppressive.

The third article provides that the convention shall remain in force for a period of five years, so that if the carefully drawn provisions prove unsatisfactory in practice they may be revised in the light of experience.

## INTERNATIONAL LAW INVOLVED IN THE SEIZURE OF THE TATSU MARU

The recent seizure (on February 5, 1908) of the *Tatsu Maru,* a Japanese merchant vessel, by Chinese authorities, for the prevention of smuggling of arms, has given rise to grave diplomatic discussion which at one time seemed likely to threaten the peaceful relations of China and Japan. It was alleged that the seizure of the vessel in question, laden with a cargo of arms destined to Macao, a port under Portuguese jurisdiction, which vessel sailed under a Japanese permit, was a justifiable act of the Chinese authorities, whether the vessel was upon the high seas or within the waters technically under the jurisdiction of Portugal, because the delivery of the arms at Macao was colorable, their real destination being to the Chinese interior for illicit purposes. It has been stated and denied that the vessel when seized was within Portuguese jurisdiction, and therefore, for the purposes of this brief note, it may be assumed that the seizure was not within Portuguese waters. If the vessel when seized was within Portuguese waters, the question, already sufficiently complicated, would be more involved, because in seizing the vessel and the cargo consigned to Macao the Portuguese jurisdiction would have been violated in law, however justifiable in morality it may otherwise have been. As, however, Portugal does not seem to advance the contention that the seizure actually took place within its jurisdiction, it may be eliminated from consideration. The question, then, presents itself whether or not a Japanese vessel upon the high seas beyond the 3-mile limit is liable to seizure, detention, and confiscation of the cargo on the ground that if the voyage be completed the smuggling laws or the revenue laws of China will be violated. Reduced to simplest form the question, therefore, is whether a seizure is permissible beyond the 3-mile limit in order to prevent a violation of the revenue laws of the country effecting the seizure. For the purposes of discussion the alleged drawing down of the Japanese flag may be omitted, because the question is not what particular act may be done, but whether any act may be committed against the foreign merchant vessel found hovering more than 3 miles off the coast with the intention of violating the revenue laws of China.

The right of visit and search upon the high seas is universally permitted in time of war, but it is a belligerent right and does not exist in time of peace, and if exercised it is wholly at the risk of the country committing the act. China, whatever the internal situation of the country may be, is outwardly at peace, and war, in the sense of international law, does not exist. Therefore the right of visit and search as a purely war right does not arise and we return to the question whether the foreign merchant vessel may be seized beyond the 3-mile limit for a violation of revenue laws. In practice and in theory the right has been claimed and exercised, and there are, indeed, statutes which permit the visitation and search of merchant vessels beyond the 3-mile limit in order to prevent the violation of the revenue laws. These acts may be divided into two classes: Revenue laws extending the right of visit and search beyond the 3-mile limit to vessels of the home or foreign country before entering port. Such acts are permissible. The rights of foreign vessels are not involved, although foreign cargo may incidentally be. A country may extend its jurisdiction to a vessel of its own nationality upon the high seas, because, the high seas being the highway of the world and not subject to any jurisdiction, the laws of the home port may be extended to its merchant vessels so placed, on the theory that the municipal law may extend to nationals not within the jurisdiction of any foreign country and therefore not subject to its rules and regulations. In Wheaton's International Law the following passage is found:

> The British "hovering act," passed in 1736 (9 Geo. II, chap. 35), assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance without payment

of duties. A similar provision is contained in the revenue laws of the United States, and both these provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations.

The statute referred to by Mr. Wheaton was passed on March 2, 1797, sec. 27, and reads, as incorporated into the Revised Statutes, as follows:

> SEC. 2760. The officers of the revenue cutters shall respectively be deemed officers of the customs, and shall be subject to the direction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose. They shall go on board all vessels which arrive within the United States, or within four leagues of the coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive, and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination.

The "hovering act" of Great Britain, referred to by Wheaton, has been, according to Mr. Boyd (Boyd's Wheaton, 241), long since repealed. This brings us to a consideration, therefore, of the American statute and its interpretation. The ablest commentator on Wheaton, and indeed one of the clearest and subtlest authorities on international law — Mr. Richard Henry Dana — takes issue with the text of Wheaton quoted, and lays down in no uncertain terms what he considers to be the true doctrine of international law in regard to municipal seizures beyond the 3-mile limit. As Mr. Dana's note is so important and has so largely influenced American practice, it is quoted in full:

> The statement in the text requires further consideration. It has been seen that the consent of nations extends the territory of a state to a marine league or cannon shot from the coast. Acts done within this distance are within the sovereign territory. The war right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favor of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon shot. Doubtless states have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign states, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The revenue laws of the United States, for instance, provide that if a vessel, bound to a port in the United States, shall, except from necessity, unload cargo within four leagues of the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo is forfeit, and the master incurs a penalty (act 2d March, 1797, sec. 27); but the statute does not authorize a

seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel, coming to an American port, and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to, and shall come within, the territory of the United States after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction. Under the previous sections of that act it is made the duty of revenue officers to board all vessels, for the purpose of examining their papers, within four leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their governments have not objected, it is probably either because they were not appealed to or have acquiesced in the particular instance, from motives of comity.

The cases cited in the author's note do not necessarily and strictly sustain the position taken in the text. In *The Louis* (Dodson, II, 245) the arrest was held unjustified because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pages 245 and 246, with reference to the hovering acts, are only illustrative of the admitted rule that neighboring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes, near the coast but beyond the marine league, as under the hovering laws of Great Britain and the United States, "has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean;" and adds, "A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by the British Government, and was finally withdrawn."

Church v. Hubbard (Cranch, II, 187) was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about four leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The court held that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws by seizures made within reasonable limits, as to which, he said, nations must exercise comity and concession, and the exact extent of which was not settled; and, in the case before the court, the four leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is that the court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues, by a foreign power was void and a mere trespass. In the subsequent case of Rose v. Himely (Cranch, IV, 241), where a vessel was seized ten leagues from the French coast and taken to a Spanish port, and condemned in a French tribunal under municipal and not belligerent law, the court held that any seizures for municipal purposes beyond the territory of the sovereign are invalid; assuming, perhaps, that ten leagues must be beyond the territorial limits, for all purposes. In Hudson v. Guestier (Cranch, IV, 293), where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port. The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, VI, 281. At the new trial the place of seizure was disputed; and the judge instructed the jury that a municipal seizure, made within six leagues of the French coast, was valid and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict — not, however, upon the ground that a municipal seizure made at six leagues from the coast was valid, but on the ground that the French decree of condemnation must be considered as settling the facts involved; and, if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly; and the verdict in the Circuit Court did not disclose the opinion of the jury on that point. The judges differed in stating the principle of this case and of Rose v. Himely; and the report leaves the difference somewhat obscure.

This subject was discussed incidentally in the case of the *Cagliari*, which was a seizure on the high seas, not for violation of revenue laws, but on a claim, somewhat mixed, of piracy and war. In the opinion given by Dr. Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure, for revenue purposes, beyond the marine league, and says that no such exception can be sustained as a right. He adds: "In ordinary cases, indeed, where a merchant ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege; considering the offending ship to have acted with *mala fides* towards the other state with which he is in amity, and to have consequently forfeited any just claim to his protection." He considers the revenue regulations of many states, authorizing visit and seizure beyond their waters, to be enforceable at the peril of such states, and to rest on the express or tacit permission of the states whose vessels may be seized.

It may be said that the principle is settled that municipal seizures can not be made, for any purpose, beyond territorial waters. It is also settled that the limit of these waters is, in the absence of treaty, the marine league or the cannon shot. It can not now be successfully maintained either that municipal visits and search may be made beyond the territorial waters for special purposes or that there are different bounds of that territory for different objects. But, as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and, if fixed, must be by an arbitrary measure, the courts, in the earlier cases, were not strict as to standards of distance, where no

> foreign powers intervened in the causes. In later times it is safe to infer that judicial as well as political tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike.

The practice of the American Government is set forth by two Secretaries of State, who brought to the performance of the duties of their office trained legal minds. In a note dated January 22, 1875, written by Mr. Fish, Secretary of State, that learned authority says:

> We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast. * * *
>
> It is believed, however, that in carrying into effect the authority conferred by the act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations.[1]

And his learned successor, Mr. Evarts, stated squarely, on April 19, 1879, that:

> An attack by Mexican officials on merchant vessels of the United States, when distant more than 3 miles from the Mexican coast, on the ground of breach of revenue laws, is an international offense, which is not cured by a decree in favor of the assailants, collusively or corruptly maintained in a Mexican court.

And in a later note, dated March 3, 1881, Mr. Evarts held that —

> The wide contradiction between the several statements does not suffice to bring the position of three of the vessels at the time within the customary nautical league. This Government must adhere to the 3-mile rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule.[2]

It is unnecessary to appeal further to authority. The jurisdiction of the home government may affect its vessels upon the high seas or in places without the jurisdiction of any other country, but it is abundantly clear that the claim to visit foreign merchant vessels beyond the 3-mile limit is without foundation in theory as it is without reputable practice. It is true that the great authority of Chief Justice Marshall may be quoted in support of the practice, but it is well established that the views expressed by the learned Chief Justice have not been supported by subsequent decision of that august tribunal over which he presided. As Professor John Bassett Moore has happily said:

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[1] Moore's International Law Digest, Vol. I, p. 731.

[2] Moore's International Law Digest, Vol. I, p. 732.

> It is not, however, by any means essential to Marshall's pre-eminence as a judge to show that his numerous opinions are altogether free from error or inconsistency. In one interesting series of cases, relating to the power of a nation to enforce prohibitions of commerce by the seizure of foreign vessels ouside territorial waters, the views which he originally expressed, in favor of the existence of such a right (Church v. Hubbart, 2 Cranch, 187), appear to have undergone a marked if not radical change in favor of the wise and salutary exemption of ships from visitation and search on the high seas in time of peace (Rose v. Himely, 4 Cranch, 241) — a principle which he affirmed on more than one occasion. (*The Antelope*, 10 Wheaton, 66.)[3]

In view, therefore, of the circumstances of the case and the unjustifiableness of the seizure of a Japanese vessel, although in Chinese waters, beyond the 3-mile limit, it is gratifying to note that China has receded from its untenable position and that the Chinese Government accepts the five conditions presented by Japan for the peaceful settlement of the incident:

> 1. An apology, with the saluting of the Japanese flag in the presence of the consul;
> 2. Unconditional release of the vessel;
> 3. Payment of the actual cost of the arms under detention;
> 4. China to engage to investigate the circumstances of the seizure and take suitable measures against the responsible persons;
> 5. An indemnity for the actual losses.

The *London Times* of March 14, 1908, from which the preceding conditions are quoted, further states that —

> Upon the acceptance by China of the above conditions, Japan undertakes to cooperate in the task of preventing the smuggling of arms into China.

The incident, therefore, seems to be closed in accordance with enlightened theory and practice.

### THE FORTIFICATION OF THE ALAND ISLANDS

Since the days when Peter the Great, after having vanquished his rival, Charles XII, seized these islands Russia and Sweden have been desirous of securing possession of them. These islands command the entrance to the Gulf of Bosnia, and the largest, from which the group takes its name, is admirably adapted by nature for the location of a strong naval and military base dominating the approach to Finland and to Stockholm.

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[3] Moore's International Law Digest, Vol. VII, p. 312.

The islands were definitely acquired by Russia by the treaty of Frederikshamm, signed September 11, 1809. The Swedish plenipotentiaries were reluctant to give up the Aland Islands at all, but wished in any event an agreement on the part of Russia not to fortify them. Russia, however, refused.

The fortifications which Russia erected were razed by the French and English during the Crimean war. At the Congress of Paris, which met at the conclusion of the war, the allies asked Russia to agree not to undertake any military or naval construction upon the islands. The Russian plenipotentiary, Count Orloff, assented, but wished to sign a separate agreement between France, Great Britain, and Russia, the only Powers who had taken part in the operations in the Baltic; but at the suggestion of the Austrian plenipotentiaries the separate act was annexed to the general treaty.

The question now arises, Has Sweden or any power not signatory to the special agreement a right to protest against the use of the islands as a military base? It must have been evident that Russia's object in signing a special agreement was to limit her obligation to the five Powers which signed with her, and that she would, as soon as possible, throw over this restriction, rejected in 1809, could not be doubted.

However, on the other hand, it may be said that even if some of the signatories to the agreement should object, the fact that this agreement is annexed to a treaty of such general purport as to regulate relations of the European powers adds to it something of the force of that treaty. That Russia was justified in throwing off the restrictions upon her sovereignty in the Black Sea is generally accorded. A humiliating and galling condition imposed after defeat will only be endured until the power is strong enough to disregard it. But the Aland matter is not identical, first, because there is nothing humiliating about its observance, and, secondly, because the observance of the agreement is of such importance to the security of Sweden.

Treaties which the great European powers make between themselves have certain advantages for those powers; for it leaves them free to declare either that they acted as the agents of all Europe, and hence bound by their action the nonparticipating powers, or to maintain that the treaty concerns the signatories alone — all other states being third parties.

# CHRONICLE OF INTERNATIONAL EVENTS

## WITH REFERENCES

Abbreviations: ***Ann. sc. pol.***, Annales des sciences politiques, Paris; ***Arch. dipl.***, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; ***Mém. dipl.***, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

*October, 1907.*

16 ROUMANIA—RUSSIA. Treaty signed regulating fishing in the Black Sea and mouth of the Danube within ten miles of the coast of the contracting countries. Became law December 7, 1907. Treaty of 1901 is abrogated. Present treaty for a term of five years, and indefinitely if not denounced.

24 COLOMBIA—ECUADOR. Ratifications exchanged at Quito of treaty of friendship, commerce and navigation signed at Quito August 10, 1905. *B. del ministerio de rel. ext.* (Bogotá), 1:186. Replaces treaties signed December 8, 1832 (*State Papers*, 60:1089; 61:1151). The articles regulating political relations are perpetual; those relating to commerce and navigation endure for six years and until one year after denouncement.

*November, 1907.*

14 FRANCE—ROUMANIA. Declaration signed at Paris, amending convention signed at Paris March 6, 1907. Commerce and navigation. French decree promulgating, January 30. *J. O.*, February 2. *Les traités de commerce de la France avec l'étranger, Ann. dipl. et cons.*, 6:55.

*November, 1907.*

28 BRAZIL—ITALY. Italian decree approving postal money order arrangement signed at Rio de Janeiro and Rome August 31, 1907. Took effect December 1, 1907. *Ga. ufficiale,* February 3.

*December, 1907.*

1 CHINA. Through traffic on the Russian and Japanese sections of the Manchurian railway resumed. *The Manchurian railway, North China Herald,* 85:597. *See June 3, 1907.*

1 FRANCE—GREAT BRITAIN. Proclamation at Port Nela in presence of Sir Everard im Thurn, High Commissioner of the Western Pacific and the governor of Caledonia, bringing into force a large portion of the Anglo-French New Hebrides convention signed October 20, 1906, providing for joint jurisdiction over the islands. *Times,* December 9, 10. *See February 27, October 20, 1906, January 9, August 29, November 2, 1907.* Additional references: *Cd.,* 3288, 3525, 3289, 2714; *Arch. dipl.,* 101:5; *Dupuis: Le condominium anglo-français aux Nouvelles-Hébrides, Ann. sci. pol.,* 22:676; *Politis: Le condominium franco-anglais des Nouvelles-Hébrides, R. gén. de dr. int. public,* 40:689; *Berthélemy: La convention franco-anglaise relative aux Nouvelles-Hébrides, R. politique et parlementaire,* February 10, 1907; *Bourge: Les Nouvelles-Hébrides,* Paris, 1906; *La question des Nouvelles-Hébrides, R. d'Europe,* June 1906; *Russier: Le partage de l'Océanie,* Paris, 1905; *Politis: La condition internationale des Nouvelles-Hébrides, R. gén. de dr. int. public,* 8:121, 230; *Politis: La déclaration concernant les Nouvelles-Hébrides, id.,* 11:755.

2 THIRD INTERNATIONAL AMERICAN SANITARY CONVENTION opened at Mexico. Adjourned December 7. Next convention at San José, December, 1909. Report in *B. A. R.,* January 1908. The first and second conventions were held in Washington.

2 INTERNATIONAL. Convention signed at Brussels November 3, 1906, enters into effect. Revises duties imposed by the Brussels convention of June 8, 1899, on spirituous liquors imported into certain regions of Africa. *See November 3, 1907.*

3 PERMAMENT INTERNATIONAL SUGAR COMMISSION adjourned. Russia enters the convention subject to conditions; her total exports of sugar to September 1, 1913, being limited to one million tons, none going to Germany or Austria-Hungary. She may

*December, 1907.*

export, however, as much as she likes to Northern Persia and Finland. A new convention embodying the conditions will be signed. *Times,* December 5. *See December 19, 1907,* and *January 20, 1908.*

8 SWEDEN. Death of King Oscar II. Born January 21, 1829; son of Oscar I., and grandson of Charles XIV. (Bernadotte); succeeded to throne September 18, 1872; married June 6, 1857, Sophia, daughter of late Wilhelm, Duke of Nassau. Succeeded by his son as Gustaf V. who married Victoria of Baden 1881.

9 FRANCE—GREAT BRITAIN. Ratifications exchanged at London of treaty signed at London November 15, 1907, to prevent as far as possible evasion of duties on succession. *J. O.,* December 14; *J. du dr. int. privé,* 35:265; *B. de statistique,* 31:585; *R. de dr. int. privé,* 3:976; study on treaty by *Wahl,* id., 1908, No. 1; also a study by *Jobit* in *J. du dr. int. privé,* 1908, No. 3. See *Clunet: Du défaut de validité de plusieurs traités diplomatiques, J. du dr. int. privé,* 7:5.

9 INTERNATIONAL. Arrangement signed at Rome by Belgium, Egypt, France, Great Britain, Italy, Netherlands, Portugal, Russia, Spain, Switzerland and United States for the organization of an international office of public hygiene to have its headquarters at Paris.

10 NOBEL PEACE PRIZE awarded to Signor Moneta, President of the Italian Peace Society and M. Renault, French delegate at the Second International Peace Conference. *See December 10, 1906.*

11 GREAT BRITAIN—MONTENEGRO. Exchange of notes at Cettigne extending time limit of commercial treaty. *Times,* December 11.

16 EGYPT—GREAT BRITAIN. Agreement signed at Cairo additional to the commercial convention signed at Cairo October 29, 1889. *Treaty ser.,* 1908, No. 2; *State Papers,* 81:1274; Parliamentary paper, Commercial No. 9 (1890). Provides for accession of British colonies, possessions, protectorates and Cyprus to convention of 1889.

17 ITALY—RUSSIA. Ratifications exchanged at Rome of treaty of commerce and navigation signed at St. Petersburg, June 28, 1907. Takes effect one month after exchange of ratifications, and remains in force until December 31, 1917, and until one year from denouncement. *Ga. ufficiale,* December 30; *B. del ministero degli*

*affari esteri,* December 1907. Annuls treaty signed September 28, 1863.

19 INTERNATIONAL. Protocol signed at Brussels by Russia, Germany, Austria-Hungary, Austria, Hungary, Belgium, France, Great Britain, Italy, Luxemburg, Netherlands, Peru, Sweden, Switzerland. Provides for accession of Russia to the sugar convention signed at Brussels March 5, 1902. *Cd.,* 3877. Takes effect September 1, 1908. *See August 28* and *December 3, 1907.*

20 SWEDEN. Accession to international sanitary convention signed at Paris December 3, 1903. *Treaty ser.,* 1908, No. 6; *id.,* 1907, No. 27. *See April 6, 1907.*

20 CENTRAL AMERICAN PEACE CONFERENCE adjourned. There were signed on this date (1) a general treaty of peace and amity, (2) a convention additional to the general treaty, (3) a convention for the establishment of a Central American court of justice, (4) a protocol additional to the convention for the establishment of a Central American court of justice, (5) an extradition convention, (6) a convention for the establishment of an International Central American Bureau, (7) a convention for the establishment of a Central American pedagogical institute, (8) a convention concerning future Central American conferences, and (9) a convention of communications. *Central American peace conference at Washington....1907,* Washington, 1907; *Am. J. of Int. Law,* January, 1908.

22 ITALY. Royal decree approving Franco-Italian regulations for executing arrangement signed at Paris June 9, 1906. Workmen's injuries. *Ga. ufficiale,* December 23, 1907; *R. di dr. int.,* 2:387; *J. du dr. int. privé,* 34:1230; *Clunet,* 1905, p. 306. *See June 4, 1907.*

23 CANADA—JAPAN. Exchange of notes at Tokyo on the subject of Japanese immigration with Canada. Text, *North China Herald,* 86:332; *Times,* January 22; *Neame: The Asiatic danger in the colonies,* London, 1907.

27 BRAZIL. Decree ratifying convention signed at Rio de Janeiro August 23, 1906, for the creation of an international commission of jurists. *Diario official,* December 29. This convention has also been ratified by Mexico, Colombia, Dominican Republic, Brazil and United States, and approved executively by Uruguay, Peru, Costa Rica, Argentine Republic and Guatemala.

*December, 1907.*

27 France—Great Britain. French decree promulgating arrangement signed at Paris, October 23, 1907, to facilitate performance of formalities provided by article 6 of the convention of commerce and navigation signed at Paris February 28, 1882. *J. O.*, December 28; *B. de statistique,* 63:60; *State Papers,* 73:22.

29 Brazil—Colombia. Approval by Brazilian senate of agreements signed at Bogotá April 24, 1907, *q. v.* Ratified by Colombian congress May 17, 1907. *Diario oficial,* May 25. (1) treaty of limits and navigation, (2) modus vivendi relative to navigation and commerce on the Ica and Putumayo rivers, and (3) a protocol complementary to the modus vivendi. *Diario official,* December 20, 1907. By common consent Brazil and Colombia agreed to regard the treaty between Portugal and Spain signed at St. Ildefonso October 1, 1777 (*Martens: Recueil de traités,* 1:634) as not in force and to make actual possession by their nationals and rights growing therefrom the criterion of possession. Demarkation to be made by a mixed commission appointed within one year after the exchange of ratifications. Sanctioned by president of Brazil January 9, 1908. *Diario official,* January 11, 1908. Text *B. A. R.*, February, 1908; *Tratado sobre límites y libre navegacion....Brasil,* Bogotá, 1908.

*January, 1908.*

1 Chile. Accession to international telegraphic convention signed at St. Petersburg July 22, 1875 (*State Papers,* 66:19), takes effect. *J. O.*, February 11.

8 Macedonia. Outrages at Dragosh. *Times,* January 20, February 11; *La question de Macédoine et des Balkans* in *Les questions actuelles de politique étrangère en Europe,* Paris, 1907.

9 Brazil. Decree approving resolution signed at Rio de Janeiro August 23, 1906, by the Third International American Conference, adhering to the International Sanitary Convention signed at Washington 1905.

11 Brazil. Congress votes continuance throughout 1908 of the twenty per cent. reduction allowed on certain specified imports of United States origin in accordance with act of June 30, 1906. *B. A. R.*, August 1906, February 1907 and February 1908. The decree No. 6079 of June 30, 1906, was issued under authority of Art. 6 of

*January, 1908.*

Law 1141 of December 30, 1903, and Art. 18 of Law 1452 of December 30, 1905. *Rowe: Our trade relations with South America, North American R.*, 184:513.

18 NORWAY. Storthing unanimously approved Norwegian integrity treaty signed at Christiania November 2, 1907. *Times*, February 15. *See February 6, 1908.*

20 GERMANY—RUSSIA. Agreement signed conferring upon Germany the right to levy the full duties and surtaxes upon Russian sugar imported into Germany for consumption there. *Times*, January 25. *See December 3, 1907.*

27 AUSTRIA-HUNGARY. Baron von Aehrenthal in his annual statement to the Foreign Affairs committee of the Hungarian delegation announced a proposed extension of Austro-Hungarian railway communications with Turkey and Greece. *Times*, January 28; *Austria, Russia* and the *Balkans, Spectator*, February 15.

27 CHINA accepts reduction of total export of opium from India by 5,100 chests yearly, beginning with 1908. *Cd.*, 3881. On January 25, 1907, China made proposals to Great Britain for the gradual abolition of the opium trade in China; August 12, 1907, Great Britain made the counter proposals accepted. *See September 20, November 21, 1906, February 7, June 28, 1907.* Parker: *The suppression of opium, J. of the Amer. Assn. of China*, July 1907, p. 39.

28 FRANCE—UNITED STATES. Additional commercial agreement signed at Washington. To supplement the commercial agreements signed at Washington May 28, 1898, and August 20, 1902 (*Compilation of treaties in force*, Washington, 1904, pp. 276, 278). President's proclamation of same date under authority of the tariff act approved July 24, 1897, applies to champagnes and other sparkling wines, the rates of duty provided by section 3 of said Act.

28 MOROCCO. Letter of Mulai Hafid to the powers protesting against the action of France in occupying Chaonia. *Mem. dipl.*, March 1; *French difficulties in Morocco, Spectator*, March 7.

29 INDIA. Order to evacuate Chumbi Valley. This order was consequent on payment by Tibet of last instalment of indemnity at Calcutta, January 27, 1908. *R. of R.*, March; *Times*, January 28. *See April 27, 1906,* and *February 8, 1908.*

*January, 1908.*

29 INTERNATIONAL. Promulgation by president of the United States of convention for the creation of an international institute of agriculture at Rome. *United States, Treaty series,* No. 489. Signed at Rome, June 7, 1905; ratification advised by the senate, June 27, 1906; ratified by the president, July 7, 1906; ratification of the United States deposited with the government of Italy, August 31, 1906. Ratifications by the following powers also have been deposited with or announced to the government of Italy: Argentine Republic, Belgium, Costa Rica, Cuba, Denmark, Egypt, Austria, Hungary, Germany, Mexico, Netherlands, Ecuador, Ethiopia, France, Japan, Great Britain, Italy, Luxemburg, Norway, Peru, Roumania, Spain, Sweden, Switzerland, China, Portugal, Russia, and Salvador. Canada, Australia, New Zealand, India and Mauritius have notified the Government of Italy of their adhesion to the said convention.

> Art. 9. The institute, confining its operations within an international sphere, shall —
>
> (a) Collect, study, and publish as promptly as possible statistical, technical, or economic information concerning farming, both vegetable and animal products, the commerce in agricultural products, and the prices prevailing in the various markets;
>
> (b) Communicate to parties interested, also as promptly as possible, all the information just referred to;
>
> (c) Indicate the wages paid for farm work;
>
> (d) Make known the new diseases of vegetables which may appear in any part of the world, showing the territories infected, the progress of the disease, and, if possible, the remedies which are effective in combating them;
>
> (e) Study questions concerning agricultural cooperation, insurance, and credit in all their aspects; collect and publish information which might be useful in the various countries in the organization of works connected with agricultural cooperation, insurance, and credit;
>
> (f) Submit to the approval of the governments, if there is occasion for it, measures for the protection of the common interests of farmers and for the improvement of their condition, after having utilized all the necessary sources of information, such as the wishes expressed by international or other agricultural congresses or congresses of sciences applied to agriculture, agricultural societies, academies, learned bodies, etc.
>
> All questions concerning the economic interests, the legislation, and the administration of a particular nation shall be excluded from the consideration of the institute.

The inauguration of the institute will take place on May 23, 1908, at the palace set apart for its headquarters, at Villa Umberto I.

*February, 1908.*

1 PORTUGAL. Assassination at Lisbon of the King and Crown Prince of Portugal. Carlos I. was born September 28, 1863, son of Luiz I. and Maria Pia who was daughter of Vittorio Emanuele, king of Italy; married May 22, 1886, Marie Amélie, daughter of Philippe Duc d'Orléans, Comte de Paris; succeeded to the throne October 19, 1889. The crown prince Luiz Philippe was born March 21, 1887. The second son of Carlos I., born November 15, 1889, succeeded to the throne as Manuel II. *Marvaud: La situation actuelle du Portugal, Q. dipl.,* 25:1; *Nation,* 86:118; *The assassination of the king of Portugal, Spectator,* February 8. Sketch of Manuel II. in *R. dipl.,* February 9. *The young king of Portugal, Spectator,* February 22; *Times,* February 3; *de Caix: Le drame portugais, La nouvelle R.,* 2:25.

4 BELGIUM. Kongo treaty withdrawn and returned to plenipotentiaries. *Cd.,* 3880; *The future of the Congo state, Spectator,* February 29; *Belgium and the Congo, North China Herald,* January 24.

5 The Governing Board of the International Bureau of American Republics unanimously adopted a resolution that the next conference of the American Republics be held at Buenos Aires, Argentine Republic, in 1910. *B. A. R.,* February.

5 TURKEY. Note of the ambassadors to the Porte with regard to the renewal of the mandates of the foreign agents in Macedonia. *Bernus: Le conflit balkanique, La nouvelle R.,* 2:49; *Macedonia and Europe, Spectator,* February 29; *Stead: Great Britain and Turkey, Fortnightly R.,* 83:417; *Britain and Macedonia, North China Herald,* 86:302.

6 FRANCE—GERMANY—GREAT BRITAIN—NORWAY—RUSSIA. Ratifications deposited at Christiania of treaty signed at Christiania November 2, 1907. "If the integrity of Norway is threatened by any Power, the governments of Germany, France, Great Britain and Russia engage, after notice thereof from the Norwegian Government, to lend by the means judged most appropriate, their

*February, 1908.*

support to that government for the purpose of safeguarding the integrity of Norway." Takes effect on exchange of ratifications, and endures indefinitely in periods of ten years each until denounced at least two years before expiration of a period. *J. O.*, February 13, 14; *Treaty ser.*, 1908, No. 4.

7 MOROCCO. Sir Harry Maclean released by Raisuli. *See June 29, 1907.* The British government treated directly through the legation with Raisuli, who obtains £20,000 and the release of 53 prisoners and becomes himself, together with 28 of his relatives, a British protected subject. Of the money, £15,000 remains for three years deposited in the State bank, for which sum as interest Raisuli will receive £50 monthly. In addition, his slave women have been returned to him who were taken soon after the destruction of his house at Zinat. *Times,* February 8.

8 TIBET. Evacuation of the Chumbi Valley by the British troops begins. *See January 29, 1908.*

10 FRANCE—UNITED STATES. Arbitration convention signed at Washington; ratification advised by the senate, February 19, 1908; ratified by the President, February 27, 1908; ratified by France, March 3, 1908; ratifications exchanged at Washington, March 12, 1908; proclamation by President of the United States March 14, 1908. *U. S. Treaty series,* No. 490.

> Art. 1. Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.
>
> Art. 2. In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that on the part of the United States such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate, and on the part of France they will be subject to the procedure required by the constitutional laws of France.

*February, 1908.*

11 GERMANY—MONTENEGRO. Ratifications exchanged of convention of commerce and navigation signed at Cettigne June 18, 1907. *Reichs-G.*, 1908, No. 8. Takes effect on exchange of ratifications and endures until December 31, 1917, and one year after denouncement.

HENRY G. CROCKER.

# PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

## UNITED STATES[1]

Africa, Convention revising duties imposed by Brussels convention, June 8, 1899, on spirituous liquors imported into certain regions of. Signed at Brussels Nov. 3, 1906; proclaimed Dec. 2, 1907. 7 p. *Dept. of state.*

France, Commercial agreement between the United States and. Feb. 1, 1908. 4 p. *Bureau of manufactures.* (Tariff series 6*a*.)

France, Reciprocity with. Proclamation. Jan. 28, 1908. 1 p. *President.*

France, Reciprocity between the United States and. Jan. 29, 1908. 3 p. *Treasury dept.* (Dept. circular 8, 1908.)

Great Britain, Commercial agreement. 1907. 2 p. *Dept. of state.*

Great Britain and Ireland, Reciprocity between the United States and the United Kingdom of. Dec. 27, 1907. 2 p. *Treasury dept.* (Treasury dept. circular 77, 1907.)

Immigration, Annual report of the commissioner-general of. 1907. 155 p. *Bureau of immigration and naturalization.* 25c.

International waterways commission, Third progress report of. 1907. 45 p. Paper, 5c.

Message to Congress at the beginning of the 1st session of the 60th Congress. 1907. 63 p. *President.* Paper, 10c.

Naturalization, Annual report of the chief of the division of. 1907. 16 p. *Bureau of immigration and naturalization.*

Treaties in force, Compilation of. 1904. [Reprint, 1907.] 996 p. *Senate committee on foreign relations.* Cloth, 65c.

## GREAT BRITAIN[2]

Canada and France, Despatch from H. M. chargé d'affaires at Paris transmitting copy of convention respecting commercial relations between. Signed at Paris Sept. 19, 1907. *Foreign office.* (cd. 3823.) 3d.

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[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

[2] Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, 2 and 4 Great Smith Street, Westminster, London.

France, Agreement between the United Kingdom and, respecting commercial travellers' samples. Signed at Paris Oct. 23, 1907. *Foreign office.* (cd. 3855.) ½d.

France, Agreement between the United Kingdom and, supplementary to the money order convention of Sept. 21, 1887. Signed at Paris June 30, 1906. *Foreign office.* (cd. 3820.) ½d.

France, Convention between the United Kingdom and, for the exchange of money orders between the United Kingdom and various French colonies. Signed at Paris June 30, 1906. *Foreign office.* (cd. 3821.) 1d.

*Hague conference.* Correspondence respecting the second peace conference held at The Hague in 1907. [April, 1906, to Oct., 1907.] *Foreign office.* (cd. 3857.) 1s. 6d.

International treaty engagements, Accessions, etc., of foreign states to various. 1907. *Foreign office.* (cd. 3783.) ½d.

Liquor traffic in Africa, International convention respecting the. Signed at Brussels Nov. 30, 1906. *Foreign office.* (cd. 3856.) 1d.

New Hebrides, Order in Council providing for the exercise of H. M. jurisdiction within the, in accordance with the convention of Oct. 20, 1906, as amended by notes of Aug. 29, 1907. 29 p. *Privy council.* (Statutory rules and orders, 1907, No. 864.)

Nicaragua, Accession of, to the declaration signed at The Hague July 29, 1899, respecting expanding bullets and asphyxiating gases. Oct. 11, 1907. *Foreign office.* (cd. 3819.) ½d.

Nicaragua, Accessions of British colonies, etc., to the treaty of friendship, commerce and navigation between the United Kingdom and. Signed at Managua July 28, 1905. 1907. *Foreign office.* (cd. 3822.) ½d.

Sleeping sickness, Further paper respecting the proceedings of the first international conference on, held at London in June, 1907. *Foreign office.* (cd. 3854.) 2d.

Transvaal, Further correspondence relating to legislation affecting Asiatics in the. [April, 1907, to Jan., 1908.] *Colonial office.* (cd. 3887.) 10d.

Turkey, Accession of, to the convention signed at Geneva July 6, 1906, for the amelioration of the condition of the wounded and sick in armies in the field. August 24, 1907. *Foreign office.* (cd. 3781.) ½d.

United States, Agreement between the United Kingdom and the, respecting commercial travellers' samples entering the United Kingdom and import duties on British works of art entering the United States. Signed at London Nov. 19, 1907. *Foreign office.* (cd. 3853.) ½d.

Universal postal union. Agreement for the exchange of insured letters and boxes, 26th May, 1906. *Post office.* (cd. 3558.) 2d.

Universal postal union. Convention of Rome, 26th May, 1906. *Post office.* (cd. 3556.) 3d.

West Indies. List of laws dealing with the emigration of laborers from the British West Indian colonies to foreign countries. 1907. *Colonial office.* (cd. 3827.) ½d.

### CANADA

France, Correspondence and memoranda in connection with the convention of 1907 respecting the commercial relations between Canada and. Ottawa, 1908. 29 p.

*Provincial boundaries.* Copy of letters, communications, memorials, petitions or documents, received during the past three years from the government of any province in the Dominion, relating to the extension or alteration of the boundaries of any province of Canada. Ottawa, 1907. 48 p.

### HONDURAS

Contestacion al manifiesto del Señor Presidente de la república dada por la Asamblea nacional constituyente. 1908. 13 p.

Laudo pronunciado por S. M. el Rey de España en la cuestion de limites entre las repúblicas de Honduras y Nicaragua precedido de una reseña del acto de su entrega oficial, de las alocuciones pronunciadas en él y del decreto No. 18 expedido por el poder ejecutivo. 1907. 31 p.

Manifiesto leído por el Señor Presidente provisional de la república de Honduras Dr. Gral. Don Miguel R. Davila ante la Asamblea nacional constituyente. 1908. 16 p.

### NICARAGUA

Relaciones exteriores, Memoria de. 1906–7. Managua. lii., 475 p. *Departamento de relaciones exteriores.*

PHILIP DE WITT PHAIR.

# JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

## THE DISCONTO GESELLSCHAFT V. AUGUSTUS C. UMBREIT.

*Supreme Court of the United States, February, 1908.*

Mr. Justice DAY delivered the opinion of the court:

The Disconto Gesellschaft, a banking corporation of Berlin, Germany, began an action in the Circuit Court of Milwaukee County, Wisconsin, on August 17, 1901, against Gerhard Terlinden and at the same time garnisheed the First National Bank of Milwaukee. The bank appeared and admitted an indebtedness to Terlinden of $6,420. The defendant in error Umbreit intervened and filed an answer, and later an amended answer.

A reply was filed, taking issue upon certain allegations of the answer, and a trial was had in the Circuit Court of Milwaukee County, in which the court found the following facts:

> That on the 17th day of August, 1901, the above-named plaintiff, the Disconto Gesellschaft, commenced an action in this court against the above-named defendant, Gerhard Terlinden, for the recovery of damages sustained by the tort of the said defendant, committed in the month of May, 1901; that said defendant appeared in said action by A. C. Umbreit, his attorney, on August 19, 1901, and answered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 19, 1904, in favor of said plaintiff, Disconto Gesellschaft, and against said defendant, Terlinden, for $94,145.11 damages and costs; that $85,371.49, with interest from March 26, 1904, is now due and unpaid thereon; that at the time of the commencement of said action, to wit, on August 17, 1901, process in garnishment was served on the above-named garnishee, First National Bank of Milwaukee, as garnishee of the defendant Terlinden.
>
> That on August 9, 1901, and on August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent of German money aggregating $6,420.00 to his credit upon account; that said sum has remained in said bank ever since, and at the date hereof with interest accrued thereon amounted to $6,969.47.
>
> That the defendant Gerhard Terlinden and said Theodore Grafe, mentioned in the finding, are identical and the same person.
>
> That the interpleaded defendant, Augustus C. Umbreit, on March 21, 1904, commenced an action in this court against the defendant Terlinden for recovery

for services rendered between August 16, 1901, and February 1, 1903; that no personal service of the summons therein was had on the said defendant; that said summons was served by publication only and without the mailing of a copy of the summons and of the complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7,500 damages, no part whereof has been paid; that at the time of the commencement of said action process of garnishment was served, to wit, on March 22, 1904, on the garnishee, First National Bank of Milwaukee, as garnishee of said defendant Terlinden.

That the defendant Terlinden at all the times set forth in finding number one was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the State of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from justice upon extradition proceedings duly instituted against him, and was thereupon extradited to Germany.

That the above-named plaintiff, The Disconto Gesellshaft, at all the time set forth in the findings was, ever since has been and still is a foreign corporation, to wit, of Germany, and during all said time had its principal place of business in Berlin, Germany; that the above-named defendant, Augustus C. Umbreit, during all said times was and still is a resident of the State of Wisconsin.

That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden, and Paul Hecking appointed trustee of his estate in such proceedings on said date; that thereafter, and on or after August 21, 1901, the above-named plaintiff, The Disconto Gesellschaft, was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such appointment; and that the above-named plaintiff, The Disconto Gesellschaft, presented its claim to said trustee in said bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and submitted is the same claim upon which action was brought by the plaintiff in this court and judgment given, as set forth in finding No. 1; that said action was instituted by said plaintiff, The Disconto Gesellschaft, through the German consul in Chicago; and that the steps so taken by the plaintiff, The Disconto Gesellschaft, had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy, so appointed in the bankruptcy proceedings in Germany, and that after the commencement of the same the plaintiff, The Disconto Gesellschaft, agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be handed over to said trustee; that, among other provisions, the German bankrupt act contained the following: "Sec. 14. Pending the bankruptcy proceedings, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors."

Upon the facts thus found the Circuit Court rendered a judgment giving priority to the levy of the Disconto Gesellschaft for the satisfaction of its judgment out of the fund attached in the hands of the bank. Umbreit then appealed to the Supreme Court of Wisconsin. That court reversed the judgment of the Circuit Court, and directed judgment in favor of Umbreit, that he recover the sum garnisheed in the bank. 127 Wis. 651. Thereafter a remittitur was filed in the Circuit Court of Milwaukee County and a final judgment rendered in pursuance of the direction of the Supreme Court of Wisconsin. This writ of error is prosecuted to reverse that judgment. At the same time a decree in an equity suit, involving a fund in another bank, was reversed and remanded to the Circuit Court. This case had been heard, by consent, with the attachment suit. With it we are not concerned in this proceeding.

No allegation of Federal rights appeared in the case until the application for rehearing. In this application it was alleged that the effect of the proceedings in the State court was to deprive the plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment, and to deprive it of certain rights and privileges guaranteed to it by treaty between the Kingdom of Prussia and the United States. The Supreme Court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt only with the alleged invasion of treaty rights, overruling the contention of the plaintiff in error. 127 Wis. 676. It is well settled in this court that it is too late to raise Federal questions reviewable here by motions for rehearing in the State court. Penn. v. St. Louis, 165 U. S. 273; Fullerton v. Texas, 196 U. S. 192; McMillen v. Ferrum Mining Company, 197 U. S. 343, 347; French v. Taylor, 199 U. S. 274, 278. An exception to this rule is found in cases where the Supreme Court of the State entertains the motion and expressly passes upon the Federal question. Mallett v. North Carolina, 181 U. S. 589; Leigh v. Green, 193 U. S. 79.

Conceding that this record sufficiently shows that the Supreme Court heard and passed upon the Federal questions made upon the motion for rehearing, we will proceed briefly to consider them.

The suit brought by the Disconto Gesellschaft in attachment had for its object to subject the fund in the bank in Milwaukee to the payment of its claim against Terlinden. The plaintiff was a German corporation and Terlinden was a German subject. Umbreit, the intervenor, was a citizen and resident of Wisconsin. The Supreme Court of Wisconsin adjudged that the fund attached could not be subjected to the payment of the indebtedness due the foreign corporation as against the claim asserted to the fund by one of its own citizens, although that claim arose after the attachment by the foreign creditor; and, further, that the fact that the effect of judgment in favor of the foreign corporation would be, under the facts found, to remove the fund to a foreign country, there to be administered in favor of foreign creditors, was against the public policy of Wisconsin, which forbade such discrimination as against a citizen of that State.

Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. 4 Moore International Law Digest, 7; Wharton on Conflict of Laws, § 17.

But what property may be removed from a State and subjected to the claims of creditors of other States, is a matter of comity between nations and States and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local State or country are asserting rights against property within the local jurisdiction.

"Comity," in the legal sense, says Mr. Justice Gray, speaking for this court in Hilton v. Guyot, 159 U. S. 113, 163, "is neither a matter of absolute obligation on the one hand nor of mere curtesy and good will upon the other. But it is the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation and extent of comity between nations and States. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine of comity, Mr. Justice Story says: "Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." Story on Conflict of Laws, § 33.

The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other States as against the demands of local creditors, by attachment or otherwise in the State where the property is situated. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in Security Trust Company v. Dodd, Mead & Co., 173 U. S. 624, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other States as to property therein situate, except so far as they come in conflict with the rights of local creditors, or with the public policy of the State in which it is sought to be enforced; and, as was said by Mr. Justice McLean in Oakey v. Bennett, 11 How. 33, 44, "national comity does not require any government to give effect to such assignment [for the benefit of creditors] when it shall impair the remedies or lessen the securities of its own citizens."

There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the State of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the State permitted such recognition was a matter for the State to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the State, the Supreme Court of Wisconsin has done no more than has been frequently done by nations and States in refusing to exercise the doctrine of comity in such wise as to impair the right of local creditors to subject local property to their just claims. We fail to perceive how this application of a well-known rule can be said to deprive the plaintiff in error of its property without due process of law.

Upon the motion for rehearing the plaintiff in error called attention to two alleged treaty provisions between the United States and the Kingdom of Prussia, the first from the treaty of 1828 and the second from the treaty of 1799. As to the last-mentioned treaty the following provision was referred to:

> Each party shall endeavor by all the means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land.

The treaty of 1799 expired by its own terms on June 2, 1810, and the provision relied upon is not set forth in so much of the treaty as was revived by article 12 of the treaty of May 1, 1828. See Compilation of Treaties in Force, 1904, prepared under resolution of the Senate, p. 638 *et seq.* If this provision of the treaty of 1799 were in force we are unable to see that it has any bearing upon the present case.

Article one of the treaty of 1828 between the Kingdom of Prussia and the United States is as follows:

> There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.

This treaty is printed as one of the treaties in force in the compilation of 1904, p. 643, and has undoubtedly been recognized by the two governments as still in force since the formation of the German Empire. See Terlinden v. Ames, 184 U. S. 270; Foreign Relations of 1883, p. 369; Foreign Relations of 1885, pp. 404, 443, 444; Foreign Relations of 1887, p. 370; Foreign Relations of 1895, part one, 538.

Assuming, then, that this treaty is still in force between the United States and the German Empire, and conceding the rule that treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured, is there anything in this article which required any different decision in the Supreme Court of Wisconsin than that given? The inhabitants of the respective countries are to be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as the natives of the country wherein they reside, upon submission to the laws and ordinances there prevailing. It requires very great ingenuity to perceive anything in this treaty provision applicable to the present case. It is said to be found in the right of citizens of Prussia to attend to their affairs in this country. The treaty provides that for that purpose they are to have the same security and protection as natives in the country wherein they reside. Even between States of the American Union, as shown in the opinion of Mr. Justice Brown in Security Trust Co. v. Dodd, Mead & Co., 173 U. S., *supra,* it has been the constant practice not to recognize assignments for the benefit of creditors outside the State, where the same came in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force as against natives of the country residing in other States, and it is this doctrine which has been applied by the Supreme Court of Wisconsin to foreign creditors residing in Germany. In short, there is nothing in this treaty undertaking to change the well-recognized rule between States and nations which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders.

The judgment of the Circuit Court of Milwaukee County entered upon the remittitur from the Supreme Court of Wisconsin is

*Affirmed.*

## THE JURAGUA IRON COMPANY (LIMITED) V. THE UNITED STATES

(Decided January 28, 1907.)

*42 United States Court of Claims, 99*

BARNEY, J., delivered the opinion of the court:

The claimant is a corporation organized and existing under the laws of Pennsylvania, having its principal office and place of doing business in the city of Philadelphia. This corporation is now, and for several years has been, engaged in the business of mining and selling iron ore and its products, and in manufacturing iron and steel products, and was engaged in that business during the Spanish war. In furtherance of the business, it owned, leased, and operated mines in the island of Cuba, and maintained offices and manufacturing works in Cuba during such war; and also owned, in connection with such works, 66 buildings, which had been used as dwelling houses for the use and occupation of its employees, and as storehouses, offices, etc., in connection with the business of the claimant.

While the Spanish war was in progress, and on or about July 11, 1898, General Miles, then in command of the United States forces in Cuba, by the advice of the medical staff, ordered the destruction by fire of the 66 houses mentioned, to prevent the spread of the yellow fever then prevalent in that vicinity, by the destruction of the fever germs which were believed to be lurking therein. At the time of the destruction of these houses, troops of the United States were stationed near them, and they were burned for the purpose of preserving the health and lives of these troops. In connection with these houses, some furniture and tools belonging to the claimant were also incidentally destroyed by said fire. Also, about the same time, other personal property of the claimant was damaged by the necessary military operations of the United States troops.

This action is brought by the claimant to recover from the defendants a judgment for damages growing out of this destruction.

The first question to be considered in the determination of this case is the status of the property destroyed — *i. e.,* whether it is to be treated as "enemy property" or the property of a citizen of the United States. The law seems to be well settled that when a citizen of one belligerent country is doing business in the other belligerent country and has built up and purchased property there which has a permanent situs, such property is subject to the same treatment as property of the enemy. At first sight this rule of law seems to be a harsh one, but when we consider that the property therein situated is a part of the assets of a country, and in a certain sense a part of the country itself, and further consider the difficulty, in stress of war, of discriminating between enemy and citizen property situated in the same country, the rule seems to be reasonable and necessary.

> A foreigner living and established within the territory of a State is, to a large extent, under its control; he can not be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the State, it may reasonably be treated as hostile by an enemy. (Hall's International Law, 5th ed., 497.)
>
> Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the State to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which can not be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized. (Hall's International Law, 5th ed., 504.)

The same doctrine is laid down in Halleck's International Law, volume 1, 414–415, and in Taylor's International Law, 533, and has been recognized by the Supreme Court (Thirty Hogshead of Sugar v. Boyle, 9 Cranch, 191).

Assuming the property in question to be treated as "enemy property," we see no ground for the contention that the Government is liable for its destruction under the circumstances as stated; for, while the severities of war are being much ameliorated by recent treaties and international conferences, war, within certain limits, is and always will be destructive of the lives and property of the enemy.

Some of the circumstances under which the property of the enemy may be destroyed are stated by the same authority as follows:

> Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender; it would even be impossible to deny to an invader the right to cut the dikes of Holland to save himself from such a fate. (Hall's International Law, 5th ed., 535; see also Taylor's International Law, 482-483.)

In the exigencies of war, the military forces of the United States were placed in a position where the lives of the soldiers were endangered by the prevalence of yellow fever, and the germs of this disease were believed to be lurking in the buildings belonging to the claimant, near which these soldiers were necessarily encamped. The danger to health and life was imminent and seemed to call for heroic measures. It would not be contended that a belligerent would not have the right, under the most humane usages of modern warfare, to destroy the property of the enemy for the purpose of protecting its army from artillery or musket fire; and we can see no reason why it should not have the same right, if necessary for the protection of its army against the ravages of disease.

About the time of the destruction of these buildings other property belonging to the claimant was damaged as a necessary incident to the military operations of our troops. As to the want of liability of the defendants for such damage, it is hardly necessary to cite authorities, but reference is made to the above text-books at the pages as noted.

We have thus far considered this case upon the assumption that the property destroyed was "enemy property," but we believe that even if it is to be considered as the property of an American citizen, no cause of action is proven against the defendants.

That a belligerent is not liable for the necessary destruction of private property of a citizen caused by necessary military operations, is also so well settled as hardly to need reference to authorities. This question arose in the case of Pacific Railroad v. United States (120 U. S., 227), and in deciding that case the court said:

> The principle that, for injuries to or destruction of property in necessary military operations during the civil war, the Government is not responsible is thus

considered established. Compensation has been made in several cases, it is true, but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than of strict legal right."

Hence, whether considering the property destroyed as "enemy property," or otherwise, we do not believe the claimant is entitled to recover, and the petition is dismissed.

## THE SLOOP TOWNSEND

(Decided February 18, 1907.)

*42 United States Court of Claims, 134*

ATKINSON, J., delivered the opinion of the court:

The sloop *Townsend,* a small New England vessel, built and registered in the State of Maine, sailed from the State of Massachusetts August 28, 1798, bound for the British island of Antigua. Her cargo consisted of lumber, shingles, staves, and fish. The vessel was owned by three American citizens of the State of Maine, who also were the owners of the cargo. In the early part of October, 1798, while on her outward voyage to Antigua, she was captured by the French privateer *Le Pellitier,* and was conveyed to Guadeloupe, arriving October 10 of that year, when vessel and cargo were condemned "as good prize" by a French court sitting at said place, for the reasons that she had not on board *"a rôle d'équipage and invoice of cargo,"* notwithstanding the fact that the evidence showed (translations by the interpreter of the French court) that she carried the following papers:

No. 1. Her register, showing that Joseph Campbell, from Boothbay, in the State of Massachusetts, mariner, together with William McCobb, esquire, and Ephraim McFarland, mariner, both from Boothbay, in said State, are the owners. Dated at the port of Wiscasset, October 11th, 1797.

No. 2. Her sea letter from the port of Boothbay for Antigua, with a cargo of boards, staves, shingles, and codfish. Dated August 28, 1798.

No. 3. Agreement of the captain with his crew for Antigua.

No. 4. His clearance from the customs-house in Wiscasset for Antigua, with a cargo of sixty thousand feet of boards, four thousand staves, sixty-two thousand shingles, thirty quintals codfish.

No. 5. Instructions from the owners to the captain for Antigua or any other port not prohibited by the laws of the United States, etc.

No. 6. A printed notice concerning the action of masters of American vessels in case of seizure or detention of their men by any foreign power.

When the sloop arrived at Guadeloupe, the master, after filing a protest, was imprisoned, remaining therein for the period of about three months. While in prison he was examined on preparatory interrogatories, and among other things testified that the *vessel and cargo were owned by three American citizens,* viz., Joseph Campbell, William McCobb, and Ephraim McFarland; that the vessel cleared from Wiscasset, Massachusetts, U. S. A., bound for Antigua, and that the cargo consisted of boards, staves, shingles, and thirty quintals of codfish, a part of the latter being the property of the crew. Shortly after his return to the United States, he appeared before a notary public and made a sworn protest against the condemnation of the vessel and cargo by the French court.

Three points were raised by counsel for the defendants in the trial of this case against any allowance by the court in favor of the claimants, to wit:

1. The decree of condemnation alleges the absence of register as a ground of seizure.
2. There was no invoice on board, and consequently there can be no recovery for the cargo.
3. There can be no recovery for insurance, for the reason that the condemnation took place prior to the payment of the premiums for said insurance.

We do not consider the first objection well founded, because we fail to find in the decree of condemnation any other reason assigned for such action (except a mere quotation from the *arrete* of the agent of the executive directory in the West Indies) than the absence among the ship's papers of a *rôle d'équipage* and an invoice of the cargo. The translations made by the French interpreter of the court show conclusively that the papers of the vessel were regular; that she carried everything, including register, required by the French decree, except a manifest and a *rôle d'équipage;* that American ownership of vessel and cargo were conclusively shown; and further, that the cargo was not contraband of war.

The absence of a *rôle d'équipage* as evidence of the neutrality of a vessel at sea, is no longer a debatable question, because it has long ago been settled by this and other courts, including those of France, that the possession of such document is not necessary to establish the nuetrality of a vessel on the high seas. (*Schooner Sallie,* 21 C. Cls. R., 340, 400, and *Schooner Industry,* 22 C. Cls. R., 1, 49.)

From what we have said above, we are clearly of the opinion that the condemnation of the sloop was illegal; and we are also of the opinion that the condemnation of the cargo, on account of the absence of an invoice of cargo or manifest, was likewise illegal. The evidence before the prize court was both documentary and by depositions. The register, the sea letter, the agreement of the captain with his crew for Antigua, the clearance from the customs-house at Wiscasset, together with the instructions of the owners and freighters of the vessel to the captain thereof prior to sailing, all of which were verified by the interpreter at the trial of the case before the prize court at Guadeloupe, clearly show that the owners of the vessel were the owners of the cargo, and that they were all American citizens. This, it seems to our minds, was sufficient evidence to establish the neutral ownership of the cargo, especially in view of the fact that the cargo itself showed that it was innocent commercial property and was consequently not contraband of war.

The French council of prizes, January 18, 1801, in passing upon the absence of one or more papers of a ship at a trial by a prize court, decided that —

> The judgment is founded in justice. It is based upon the provisions of the regulation of 1778. Its conclusions can not but be approved by the council which has neither seen nor been able to see in the instruction of the owner to the captain anything but a ship's paper as authentic, as legal, as conclusive of neutrality, as the laws, justice, and reason require.
>
> The denomination of the paper does not destroy its contents. It is not such or such a ship's paper under such or such denomination that the law requires, but proof of neutrality. That of the cargo is clear, since the paper in question combines all the characters of the papers enumerated by the law.
>
> The manifest is not embraced according to the ordinances and regulations in the enumeration by name of ship's papers, but it is impliedly comprised in the general expression of the law "and other papers establishing neutrality;" any other paper establishing this proof fulfills the letter, the spirit, and the purpose of the law. This is so true that the council has received as a bill of lading a general manifest in a case on the report of Citizen La Coste.
>
> If the manifest, of which the law does not speak, is impliedly comprised in the collective expression "and other papers," it follows necessarily that the instruction of the owner to the captain should be ranged in the class of other papers, since it comprises everything which the charter party, the invoice, the bill of lading, and the manifest could regularly import. (1 Pistoye & Duverdy, 438, 439.)

This court decided in the case of the schooner *Hazard* (39 C. Cls. R., 376) that the protest of the master of a vessel as to its neutrality should have great weight as over against the absence of some of the papers of a vessel in condemnation proceedings. The opinion says:

> We know now from the subsequent protest of the master that the cargo of this vessel was neutral. The careful representative of the Government concedes this while properly contending that the proceedings resulting in condemnation must not be determined by subsequent developments, but by the proof in hand at the time. Neutrality was the thing to be proved to those rightfully charged with the privilege of considering the fate of the prize. But was neutrality proved? The report of the capture shows that the vessel was seized because the clearance was in contravention of the laws and customs of France. The absence of papers was not suggested nor suspicion raised at the time in regard to the neutral character of the freight. The vessel was registered, but notwithstanding she showed her sea letter the prize court condemned both vessel and cargo on the same ground. The oral testimony before the tribunal was direct that the proprietary interest was in citizens of the United States. While the question of going outside the papers is not free from doubt, we think, on the whole case, this oral testimony was competent and sufficient to exonerate the cargo. This seems to us, upon reflection, to be more nearly in consonance with the rules of international law and the reasons which underlie the action of nations in dealing with each other in time of war than a rule making papers the sole test.

It was decided in the case of the *Industry* (22 C. Cls. R., 1) that the lack of a particular paper of a vessel may be punishable under certain circumstances within local jurisdictions as a police measure, but never by absolute confiscation, when it is shown that the vessel is innocently pursuing a legitimate voyage. An accident is easily supposable by which, after leaving port and while on the high seas, all the papers of a ship may, by fire or water, be destroyed. On that account should the ship and cargo, or either of them, be confiscated? We know of no rule of law, municipal or international, which would authorize such a course.

In Hooper's case (22 C. Cls. R., 1) it was held that, while it is true the *onus probandi* is upon the captured vessel in all prize court proceedings, in order to clear herself from suspicion, yet no particular paper is indispensable to accomplish such purpose, and that an honest, commercial, lawful voyage may be shown though no paper of any sort be presented.

In the disposition of this class of cases this court has uniformly decided that all questions of neutrality are questions of good faith, in which actual facts, and not simply appearances, must be looked into, and that the mere absence of a particular document, or an irregularity in form, does not authorize condemnation as good prizes in any case. The truth must be sought, and that not by technical forms. Simple omissions or irregularities should never obscure the truth if it be otherwise proved. The essential question is whether the cargo is or is not, in fact, neutral.

It is not of importance that the municipal law of one government requires the presentation of particular papers. The severity of the legislators is always subordinate to the surrounding circumstances, which alone lead to conviction. The neutrality should be proved, but this may be done notwithstanding the omission or irregularity of certain prescribed forms. (*Schooner Hazard,* 39 C. Cls. R., 376, 380.)

The case of the schooner *Betsy* (36 C. Cls., 256), upon which the defendants rely as sustaining their contention that the seizure of the cargo of the *Townsend* was a proper procedure, is by no means on all fours with the case before us. The *Betsy* carried a manifest showing of what her cargo consisted, but she produced no document or other evidence which showed that it was owned by American citizens and not by belligerents. The claimants in that case relied mainly upon a New England custom to the effect that among vessels engaged in the trade with the West Indies no proof of ownership was necessary when the cargo belonged entirely to the owners of the vessel carrying it. The court very properly held in that case "that the courts of another nation were not bound to take notice of a local custom utterly at variance with the provisions of the treaty of 1778 and the requirements of international law;" that it was necessary to show whether the cargo was the property of neutral or belligerent owners, and that a prize court of a belligerent power was justifiable in condemning property as good prize unless neutrality of ownership is clearly established. The court further held in that case as follows:

> Ownership is one thing and neutrality is another. The French prize court was not interested in the question whether the cargo belonged to this or that American citizen, but in the question whether it was the property of neutral or belligerent owners. A prize court of a belligerent power was entitled to have the neutrality of a cargo established. The treaty of 1778 was based upon the principle that free ships make free goods; but it also required "that if either of the parties should be engaged in war the ships and vessels belonging to the subjects or people of the other ally must be furnished with a sea letter or passports made out according to the form annexed to the treaty, and likewise that such ships should be provided always with a certificate containing the several particulars of the cargo." (Art. XXV.)
>
> The manifest on board answered this last requirement, so that if the vessel had been seized before the abrogation of the treaty and had carried a proper passport her cargo would have been exempt from seizure. There is no evidence in the case except a register, a manifest, and the local custom above referred to. It is recited in the decree that she had a sea letter not properly attested, but it does not appear that the sea letter was that prescribed by the treaty, and if it were it would not have been obligatory, we think, upon France after the

> abrogation of the treaty by the act of 7th July, 1798 (1 Stat. L., p. 578), on the part of the United States.
>
> It seems, then, only too apparent, so far as now appears, that the vessel carried nothing to establish the neutrality of the cargo. There is no protest on the part of the master in the case, showing the circumstances of the seizure and condemnation, or that he had asserted the rights of American owners, or offered proof of the neutrality of the cargo, or established any ground upon which this court can hold that the condemnation was illegal and unjust. The fault was the vessel's. Upon this evidence, and want of evidence, it must be held that the prize court was justified in decreeing condemnation.

In the case at bar the *Townsend* carried a register, a sea letter, the agreement of the captain with his men, showing the destination of the vessel to be the port of Antigua, clearance papers from Wiscasset, U. S. A., instructions from the owners to the captain for Antigua, a printed notice showing what action should be taken in case of seizure, and after the sloop was seized by the *Le Pelliter* the evidence of the captain of the *Townsend* was taken while he was in prison and was read at the trial, which stated positively that the owners of the cargo were the same persons who owned the vessel (which fact was also stated in the decree of condemnation); that all of them were American citizens, and therefore in no respects were belligerents; while, as shown above, the only evidence presented in the case of the *Betsy* relied upon to establish the neutrality of her cargo was a register, a manifest, and the local New England custom to which we have referred.

We agree with the counsel for the defendants that the claim for the insurance on the sloop and cargo is not valid as against France, for the reason that the same was effected by two policies dated the 11th and 21st of December, 1798, and as the condemnation of sloop and cargo took place October 18, prior to the issuance of the same, France cannot be made liable for the premiums therefor, nor is the United States chargeable therewith. Consequently no allowance can be made in favor of claimants for premiums of insurance so paid. (*Schooner John Eason,* 37 C. Cls. R., 443, 447.)

The theory upon which a premium of insurance has been deemed recoverable in this class of cases is that the payment of the premium adds so much to the value of the property insured; but the liability of France is limited to the value of the property at the time of its illegal seizure or condemnation and cannot be augmented by subsequent transactions between owners and insurers.

There was another question of vast importance raised in the trial of this case, viz., that immediately following the capture of the *Townsend* and her arrival at Guadeloupe her captain was imprisoned and was not allowed to be personally present at the trial before the prize court, although it is established that his deposition was taken while he was in prison and was read at the hearing of the case. Counsel for the United States insists that he was duly heard in his own defense, although not personally present at the trial, yet he was nevertheless legally heard, and, as a matter of fact, "had his day in court." He further insists that it is a privilege and not a right for a litigant to appear in court by counsel. Without attempting to pass upon the statement of counsel as to the rights of litigants to appear in legal tribunals personally or by authorized attorneys, under the customs and rules formerly and at the present time which prevail in this and other countries, we shall advert only to the decisions of this court in such matters.

In the case of the brig *Sally* (37 C. Cls. R., 74) it was held that when a vessel is seized the master should have the right to appear and defend his ship and its cargo against the alleged illegality of the voyage, and by refusing him such privilege he was denied due process of law. It was also further decided in that case that "*the fact of sale and the absence of the master from the judicial proceedings* in which it may be the ship was condemned."

In the case of the snow *Thetis* (*Ibid.*, 470) the right of the master or some other officer of the vessel in duress to be present in a court during condemnation proceedings is clearly and unequivocally reaffirmed, by quoting with approval from Sir William Scott the following paragraph:

> Before the ship or goods can be disposed of by the captor there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the law of nations and treaties.

The right of an officer to defend his vessel after seizure has been made is carefully set forth in the case of the schooner *Maria* (39 C. Cls. R., 147). In that case it was decided substantially that while it is true the seizure and condemnation of a vessel may have been made for good cause, yet it was a right of the master to be present at the prize court to defend the owners, and where he was prevented by imprisonment from so doing the proceeding was *ex parte* and wholly void.

A prize proceeding is an action *in rem*, and where the master of a captured vessel absents himself on his own volition, such an act would not operate to defeat a condemnation otherwise valid. And while the examination of a master *in preparatorio,* while under that duress which is implied from the mere capture of his vessel, would be competent evidence to be considered in the first instance for the condemnation of the vessel, it would not be if the master, in addition to such implied duress, were imprisoned and the examination *in preparatorio* was behind prison bars, because in such case the master would be deprived of his liberty and his answers might bear the impress of such imprisonment. The latter is this case, and, therefore, if the seizure and condemnation were otherwise legal, that of itself, under the decisions of this court, is sufficient to justify the court in holding that such condemnation was illegal. A prize proceeding is no exception to the universal principle of justice, which requires a proper legal hearing before condemnation can be ordered. (*The Snow Thetis,* 470, *supra; The Good Intent,* 36 C. Cls., 262, 265.)

The findings of fact and conclusions of law will be reported to the Congress, together with a copy of this opinion.

HOWRY, J., concurring as to the sloop, but dissenting as to the cargo:

I concur as to the illegality of the condemnation of the sloop, because its nationality was sufficiently proven to the prize court by its register and other papers.

I dissent as to the cargo, because the belligerent rights of the French (which became American rights under the act of our jurisdiction) are shown by the decree and the surrounding circumstances, and have not been disproved under the rule that the decree of a prize court is conclusive against all the world as to all matters decided and within its jurisdiction. (Williams v. Armroyd, 7 Cranch, 603.) Such decree does not usually state the grounds of condemnation, but where it does is conclusive of its own correctness. The fact of real title is open to investigation only as to those matters not concluded by the recitals of the decree. (Maley v. Shattuck, 3 Cranch, 642.)

The decree recites want of a *rôle d'équipage* and the absence of an invoice.

The majority say the absence of a *rôle d'équipage* is no longer a debatable question. (Neither side makes it a question.)

But the invoice was quite material, because its absence is strong presumptive evidence against neutrality. What, then, do we find? No sufficient proof of property, no muster roll, no bill of lading, no manifest, no invoice. These are some of the papers which are always expected to be found on board. (Baker's Halleck's Int. Law, sec. 98; 1 Chitty's Com. Law, 487.)

The case is not sustained by the *Hazard*, Campbell (39 C. Cls. R., 376). Proof *aliunde* the vessel's papers was admitted in the *Hazard*, not to contradict the recitals of the decree as to the invoice, but, as the papers were not deemed the sole test of neutrality, the court looked to all other papers and some subsequent testimony to determine neutrality. In the case at bar we do the same thing. But here the master's protest only alleges ownership of the vessel, and does not claim neutrality for the cargo. There is no subsequent paper disclosed except a general statement at the time of the sloop's clearance that its owners were freighterers. "Freighter," in French law, is the owner of the vessel, and the merchant who hires is called the "affreighter" (Emerigon-Traite, Des. Assurances; Black's Law Dictionary). That there was no paper on board which showed neutrality of the cargo, and that the master's protest and the circumstances confirmed the truth of the decree, establishes the condemnation legal as to the cargo. The good faith of the French is shown by the subsequent delivery of every paper in this case to the American owners of the sloop.

The *Hazard*, Campbell, *supra* — Howry, J., speaking for the court — was the extreme of liberality in this class of cases. There it appeared that the Supreme Court had said that the law of nations presumed and required that in time of war every neutral vessel should have on board papers showing her character, and should also have officers and crew able to testify to facts establishing neutrality. This court gave effect to that other decision of the Supreme Court in the *Amiable Nancy* (3 Wheat., 561), where it appeared that the mere want of papers could not afford a just cause of condemnation, but a circumstance of suspicion explainable *by the preparatory examinations of the officers and crew*, and by the fact of a voluntary arrival. Accordingly, the decision went off on the ground that, while the absence of papers was strong presumptive evidence against the ship's neutrality, the want of any one of them was not absolutely conclusive (1 Kent's Com., 157).

In the case at bar, the absence of the invoice was suggested, and it has never been accounted for — not even in the subsequent protest of the master. Hence the decree is conclusive.

So much of the opinion of the majority as rests the supposed illegal action of the prize tribunal upon the alleged imprisonment of the master is a matter too important to be passed over. It says that the master was not allowed to be personally present at the trial. The master does not say so. There is not a syllable in the entire evidence which supports that statement. The master merely states in general terms that he was imprisoned three months. How, where, whether on the island in duress like nearly every blockade runner or shipmaster violating the laws of neutrality, does not appear.

The record shows that there was a regular judicial proceeding and that the master was there. He must have been there delivering testimony, because his deposition shows him to have been there.

These considerations take the case out of that class where this court has decided that imprisonment and absence operated to prevent the master from being heard in his defense, and where we have held that the matter of imprisonment was necessary to be considered to prevent confiscation. Not a single case has ever been decided by this court where it has appeared that if the master's evidence was taken and the record shows that he was there the duress of his person made void the proceeding. When a vessel is on trial for violating the laws of neutrality, the master and crew are all under duress and practically in restraint. It is upon the ship's papers and the examination taken *in preparatorio* that the case is tried.

In *Dos Hermanos,* 2 Wheat., 76, the Supreme Court has held that in prize cases the cause is to be heard exclusively upon the ship's papers, and the examination of the principal officers and seamen of the captured vessel taken on the standing interrogatories. *This is the established rule.*

In the case of the *Ann,* in 3 Wheat., 434, the vessel was captured by an American privateer while at anchor near the Spanish port of the island of St. Domingo and carried into New York for adjudication. The master and supercargo were put on shore at St. Domingo, and all the rest of the crew, except the mate, carpenter, and cook, were put on board the captured vessel. After arrival at New York the deposition of the cook was taken, which, with the ship's papers, were transmitted by the commander to the judge of the district of Maryland, to which the case of the *Ann* was removed. The trial upon prize proceedings being instituted, the testimony of the carpenter was taken by the claimants, and the captors were also permitted to give testimony. The separation of the master and the principal officers and the crew from the vessel was not held fatal to the regularity of the proceedings.

These decisions from the Supreme Court prove that the award in this case, predicable upon the alleged imprisonment, is an innovation in prize law. Numberless prize proceedings during the war between the States would now appear to be illegal if this award is law. And when we come to consider that the awards of this court in these cases are not the subject of review by the Supreme Court and that this erroneous decision on a matter so vital (as I view it) will some time or other turn to vex the Government, it is of more than passing importance that the reasons of my dissent shall be recorded.

No case decided by us is authority for this award. The conclusions are squarely against the ruling in the *Betsey,* 36 C. Cls. R., 256, where Nott, Ch. J., said that though that vessel carried a manifest showing of what the cargo consisted and that it was an innocent or commercial cargo, nevertheless she carried no document whatever to show neutrality. The conclusion there was that the prize courts of a belligerent nation were not bound to take notice of a local custom at variance with the requirements of international law or to infer, in the absence of an invoice, that the cargo belonged to the owners of the vessel. That is this case.

Nor are the conclusions of the court supported by the snow *Thetis* (37 C. Cls. R., 472), where Howry, J., speaking for the court, said that "where the decree of a prize tribunal is silent as to the presence of the parties in interest and there is neither protest nor proof equivalent to it showing that the owners or their agents were denied a hearing, the presumption is that they were present and given an opportunity to defend. But where it can be gathered from the action of the prize court or from proof contemporaneous with the transaction that the proceeding was one of those which justified the American complaint of that period respecting condemnations without notice to vessel owners, no effect will be given to the summary disposition of a vessel under such a decree." Then followed the statement that, though the decree showed on its face that the decision upon its announcement was to be notified to the master, there was nothing to show his presence or the presence of any other person in interest at the hearing.

There is nothing to change in the *Thetis* opinion. The failure to notify the decision of the prize court to the master there was merely intended by this court to emphasize the fact that neither the master nor other person in interest was present at the hearing. The master was even denied the opportunity to see his ship or the authorities who took it away from him while he was imprisoned elsewhere, and the statement as to the notice given to the mate was an immaterial statement. The extract from the *Thetis* by the majority is as defective (in not stating enough) as the citation from the same case of counsel for claimant is inapposite. No court holds itself bound by any part of an opinion not needful to the ascertainment of the right or title in question between the parties. (Carroll v. Lessee, 16 How., 286.)

Common-law principles and common-law rules of evidence have frequently been objected to in these cases, because counsel have argued (present counsel included) that common-law proceedings were relaxed by the statute of our jurisdiction. Now it appears that common-law proceedings are invoked by way of precedent to sustain this finding as to the cargo.

But prize proceedings are summary and differ materially from common-law rules of procedure. "Notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made." The books are full of cases showing that in a libel pending in an admiralty jurisdiction the manner of the notification is immaterial.

The late Justice Gray decided legal questions, including those pertaining to admiralty, so satisfactorily to the people of Massachusetts that he was called to the bench of the Supreme Court of the United States. Speaking for that tribunal, he said:

> The law of nations presumes and requires that in time of war every neutral vessel shall have on board papers showing her character, and shall also have officers and crew able to testify to facts establishing her neutrality. The captors are therefore required immediately to produce to the prize court the ship's papers, and her master or some of her principal officers or crew, to be examined, on oath, upon standing interrogatories and without communication with or instruction by counsel. The cause is heard in the first instance upon these proofs, and if they show clear ground for condemnation or for acquittal no further proof is ordinarily required or permitted. If the evidence *in preparatorio* shows no ground for condemnation and no circumstances of suspicion the captors will not ordinarily be allowed to introduce further proof, but there must be an acquittal and restitution. When further proof is ordered it is only from such witnesses and upon such points as the prize court may, in its discretion, think fit. (Cushing v. Laird, 107 U. S., 77.)

The conclusions of the majority proceed upon the inconsistent assumption that the master was not there to be believed, but if he was there that he should have been believed. Belief of a witness is always a matter of discretion in any kind of a court having jurisdiction.

There is a final observation not justified by the opinion of the majority. There is no proof that the master was behind prison bars. That is a mere inference arising from the general statement set forth in the master's protest after he got home, that he was imprisoned. He may have been, but the record shows him to have been at the trial.

As to the cargo, therefore, the award is erroneous.

I am authorized to say that Booth, J., concurs in the findings and conclusions expressed in this dissent.

## HO TUNG & CO. V. THE UNITED STATES

(Decided February 25, 1907.)

*42 United States Court of Claims, 213*

BARNEY, J., delivered the opinion of the court:

The claimants were copartners and subjects of Great Britain, doing business at Hongkong, China, and as such copartners, in the month of August, 1898, shipped certain merchandise from Hongkong to Manila, in the Philippine Islands, and upon the arrival of said shipments at Manila were required to pay to the United States military authorities at that place the duties upon said merchandise prescribed by the Spanish tariff, the same having been continued in force by order of the officer in command of our military forces at that place theretofore promulgated. The port of Manila came into possession of our military forces on the 13th day of August, 1898, and the order last mentioned was issued on the 19th following.

On the 13th day of July, 1898, the following military order was issued at Washington by the Secretary of War:

WAR DEPARTMENT,
*Washington, July 13, 1898.*

The following order of the President is published for the information and guidance of all concerned:

"EXECUTIVE MANSION, *July 12, 1898.*

"By virtue of the authority vested in me as Commander in Chief of the Army and Navy of the United States of America, I do hereby order and direct that, upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

"Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

"Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

"Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

"WILLIAM MCKINLEY."

Upon the occupation of any ports or places in the Philippine Islands by the forces of the United States the foregoing order will be proclaimed and enforced.

R. A. ALGER,
*Secretary of War.*

It is conceded by both parties that this order and the schedule of rates therein referred to did not reach Manila until some time after the 1st of September following, and after the arrival of the claimants' merchandise at that port and the payment of the Spanish duty thereon as stated. It appears, however, that news had reached the place that some order of the kind had been issued by the President, but its exact contents or the schedule mentioned were unknown. The claimants appear to have contended that their merchandise, being an American product, was not liable to the payment of any duty whatever, and protested against the payment of any duty on that ground, and made no other protest.

This action is brought to recover from the defendant the difference between the amount of the Spanish tariff so paid and the amount if levied according to the order of the President, the same in our exchange being $4,330.72.

The claimants in their petition ask judgment for $32,945.33, the whole amount of duty paid upon the claim, for the reason already stated that no duty whatever could be exacted; but that contention seems to have been abandoned.

It will thus be seen that the difference in the tax as collected and paid was paid under the mutual mistake of the parties; that is to say, both parties at the time of payment supposed the Spanish tariff to be in force, and had no knowledge of the schedule as provided by the order of July 12, 1898. This being the case,. the question of protest would seem to be eliminated from our consideration, as the Supreme Court appears to have decided that under such circumstances no protest is necessary (Lapeyre v. United States, 17 Wallace, 191; Norton v. United States, 97 U. S., 164). But as this case is decided upon another point, that question is not considered and is not herein decided. We shall assume, however, in the decision of this case, either that such protest was made or was unnecessary.

The question, then, for us to determine is, When did the order of the President of July 12, 1898, go into effect at Manila — on the day of its date or when it was received and put in force at that place? The answer to this question is somewhat embarrassing, for the reason that no authorities directly bearing upon the subject have been cited to this court by the counsel on either side, and we do not know that any such can be found; certainly in the limited time given for its consideration here no such authority has been found.

Acts of Parliament take effect from the time that they receive the royal assent, and by relation from the earliest moment of the date on which it is given (Tomlinson v. Bullock, 42 B. Div., 230), and this rule has been applied in this country, unless otherwise provided in the act itself or by some other law. (Arnold v. United States, 9 Cranch, 104; Matthews v. Zane, 7 Wheat., 164; Wellman's Case, 20 Vt. 653.)

It is contended by the claimant that the same rule should apply to military orders of the President, and the case of Lapeyre v. United States (17 Wall., 191) is cited as sustaining that contention. It was there decided that a proclamation of the President declaring certain ports, theretofore closed to foreign commerce by the proclamation of a former President made pursuant to act of Congress, to be open to foreign commerce took effect when it was signed by the President and sealed with the seal of the United States officially attested. It may be well, however, to note here that that case was an appeal from this court, but that both courts were divided upon this question. Owing to the illness of one of the judges this court was equally divided. The history of the case in that respect is told in the reporters' statement of the case in this court:

> This case has singularly divided two courts. In the court below a reargument was ordered on the principal question whether a proclamation of the Executive takes effect from the day of its date or the time of its promulgation; and the court then stood equally divided, one judge being prevented by illness from taking part in the decision. For the purposes of an appeal, judgment was entered dismissing the petition, and an appeal was taken. In the Supreme Court a reargument was also ordered on the same point, and the court then stood five for reversal and four for affirmance, with one of the majority merely concurring in the conclusion that the judgment should be reversed. (Le Peyre v. United States, 8 C. Cls. R., 165, 166.)

The case at bar is distinguishable from that case in at least two important respects: (1) That was the proclamation of the President by virtue of an act of Congress; (2) this was a military order of the President, as Commander in Chief of the Army and Navy of the United States, to be enforced in a foreign country under our military control.

That every citizen is presumed to know the laws of his own country, or the country in which he transacts business, and is bound at his peril to obey them, is elementary; and it follows as a corollary to this rule that he is presumed to have knowledge of all such laws from the day they take effect. When we take into consideration the fact that the greatest judges and best lawyers are ignorant of a large percentage of the laws, this rule seems to be a harsh one, and it often does work great injustice. It is a law of necessity, however, and a little thought shows that no other rule would be safe. The antithesis of this rule is also equally well established, that ignorance of a law of a foreign country is merely ignorance of a fact which no one can conclusively be presumed to know; and, when necessary, foreign laws are put in issue in pleadings and proven the same as any other fact.

In the leading case of Cross v. Harrison (16 How., 180) one of the questions involved was the right of the plaintiffs to recover customs duties paid by them at the port of San Francisco during the time from the date of the treaty of Hidalgo and the time when official notice of the treaty was received in California, a period of about two months. During the Mexican war San Francisco was seized and taken possession of by our military forces, and customs duties were levied and collected by them in the exercise of belligerent rights; and the rate of duty thus prescribed was collected until notice of the treaty of peace and the cession to us of California was received, whereupon this war tariff was abandoned and duties were afterwards levied in conformity with the tariff laws applicable to other ports of the United States.

That action was brought to recover all of the duties paid by the plaintiffs between February 3, 1848, the date of the treaty of peace, and November 13, 1849, the date the collector at San Francisco entered on the duties of his office; but in the decision of the case the court distinguishes the duties paid after such notice. It appears, inferentially at least, that the rate of duties collected under the war tariff was different from the rate under our general tariff laws then in force. (*Ibid.*, 189.)

The court, in considering the duties paid during that period, decided that they were properly collected at the rate and in pursuance of the war tariff until notice of the ratification of the treaty of Hidalgo had been received in California.

In Burke v. Miltenberger (19 Wall., 519) one of the questions involved was whether a military order issued May 17, 1865, by General Banks, then commanding the Headquarters of the Gulf, operated as an injunction upon the proceedings of the marshal who had made a sale pursuant to a judgment rendered in a provisional court then existing in the State of Louisiana during the civil war, it appearing that said order was never brought to the notice of either of the courts of Louisiana engaged in the decision of the case.

The court decided this order, under the circumstances, to have no force in the courts, and said:

> It may be that the courts of the country would take judicial notice that Louisiana at the time mentioned was in the military occupation of our forces under General Banks, but we know of no rule of law or practice requiring this or any other court to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him. (*Ibid.*, 526.)

It is unquestioned that upon the occupation by our military forces of the port of Manila it was their duty to respect and assist in enforcing the municipal laws then in force there until the same might be changed by order of the military commander, called for by the necessities of war. (Hall's International Law, 4th ed., sec. 155; Taylor's International Law, secs. 576, 578.)

The commander of our forces had the right to take possession of the machinery for the collection of the revenue within the occupied district, and to make such collections. (Hall's International Law, sec. 158; Taylor's International Law, sec. 531.) It was therefore well within the authority of General Merritt to make the order he did, continuing the Spanish tariff in force at that port until the same might be changed by higher military authority.

While our occupation of Manila became permanent by subsequent treaty, our possession at the time of the collection of these duties was temporary only, and in point of law was no different from the usual military occupation of belligerent territory. It was foreign territory in our temporary possession, and during such possession we were exercising there the restricted rights of a belligerent. If the President, as Commander in Chief of the Army and Navy, had issued an order here in Washington which had affected the personal conduct of Spanish subjects in Manila, we do not think it could be reasonably contended that those subjects would be presumed to have knowledge of the contents of such order before it had been received and promulgated there. In other words, such an order would not be in force at Manila till it had been received and made known there. If this position is right, it would seem to follow that our military forces there would act in the enforcement of belligerent rights, under the orders of the officer in immediate command, until such time as actual notice of different orders had been received from some superior officer.

For all practical purposes it was foreign territory, and our military forces there were governing under the rules of international law, and in a sense legislating under such rules until receiving notice of different legislation by a superior power. It was a government *de facto*, military in character, and subject only to higher military authority actually put in force.

Taking this view of the case, we do not believe that any order of the President providing a tariff schedule for the Philippine Islands would have the effect of modifying any existing tariff regulations there until actually received and promulgated.

Hence, it is the judgment of the court that the petition be dismissed.

# BOOK REVIEWS

*The Law of Private Property in War, with a Chapter on Conquest.* (Being the Yorke Prize Essay for 1906.) By Norman Bentwich. London: Sweet and Maxwell. 1907. pp. xii., 151.

This work is a brief statement of the law at the time of its publication, and makes no pretense of originality or of exhaustive treatment. It is clearly written and is of much value because it presents the law regarding private property as a unit, unencumbered with the discussion of other subjects.

Although the author cites some continental treatises, his work is almost entirely based upon English and American authorities, and in most cases he supports the English position upon questions of international law. This is not true, however, with reference to the English and American doctrine that the domicile of the owner determines the fate of private property captured at sea. Bentwich here advocates the French principle of nationality as one which in its practical operation is better than the principle of domicile.

The discussion of the British position against the exemption from capture of private property at sea is a good one, and the distinction between private property on land and private property at sea is well made, but the author's argument hardly sustains his position. The destruction of maritime commerce is, as he says, one of the most effective weapons for bringing an enemy to terms; but so also were devastation of territory and confiscation of private property on land effective means of warfare, but these practices are now forbidden. He seems to be right in his statement that the continental European powers advocate the exemption of private property at sea because of their own interests, and that it is to England's interest to maintain the present rule.

The author thinks, however, that the losses resulting from captures of private property at sea should not be allowed to fall upon the owners of the captured vessels and cargoes. He says that "when vessels and cargo at sea are confiscated it would seem consistent with general principles that the state whose citizen has suffered should compensate him for his loss, which has been largely insured on behalf of the whole body," and cites the practice which prevails, at least to a certain extent, with reference to land warfare, that each nation should at the end of a war make the burden as far as possible a national one by reimbursing its citizens who have suffered losses of property. In another respect, also, he favors the development away from the close connection of warlike operations with individual interests: "The present custom of dividing among the captors the proceeds of sale after adjudication by a prize court preserves in maritime war that taint of belligerent greed and of interested attack upon private property which is against the spirit of modern warfare, and which has been declared illegal in land operations." In this connection it is gratifying to recall that the United States has been one of the first countries to abolish the predatory institution of "prize money."

Unfortunately, the Second Hague Conference made no great changes in the substantive law for the protection of private property at sea, and Bentwich's work still forms an excellent statement of existing law. In using this book, however, the reader should have in mind the provisions of the final act of the Second Hague Conference which relate to the exemption from capture of mail vessels and of vessels engaged in local commerce and in inshore fishing, to the establishment of a definite rule against the bonbardment of unfortified places by naval vessels, to the exemption from capture of merchant vessels found in the ports of an enemy at the time hostilities begin, to the transformation of merchant vessels into war vessels, to the placing of submarine mines, and to the establishment of an international prize court.

The literary style of the work is good, although use is occasionally made of such awkward words as "bindingness." Numerous typographical errors attest the fact that the proofreading was not carefully done.

W. F. DODD.

*Some Neglected Aspects of War.* By Captain A. T. Mahan, U. S. N. Boston: Little, Brown & Co. 1907.

Under this title Captain Mahan has republished in book form several articles of his own which have appeared in magazines, together with an article by Henry S. Pritchett, entitled "The Power that Makes for Peace," and one by Julian S. Corbett on the "Capture of Private Property at Sea." The opinions of the three writers blend harmoniously together and the result is a most convenient little book in defense of war. That war is on the defensive and seems likely so to remain shows what a change has taken place in the sentiments of mankind during recent years.

Captain Mahan has gone to the very bottom of the question and shown up in the fairest manner, free from any tendency to exaggeration, the advantages of war and its actual necessity. He says (page 24):

> If, on the one hand, there is solid ground for rejoicing in the growing inclination to resort first to an impartial arbiter, if such can be found, when occasion for collision arises, there is, on the other hand, cause for serious reflection when this most humane impulse is seen to favor methods which by compulsion shall vitally impair the moral freedom and the consequent moral responsibility which are the distinguishing glory of the rational man and of the sovereign state.

If we agree with the author in the above statement, we must in conscience admit that we do so because the picture he has drawn is the ideal of our present state of development, but any falling away from this ideal which he might classify as degeneracy may be, on the contrary, a step toward a better condition.

The nature of law is ably handled on page 29, where it is shown that the individual must, at the bidding of his conscience, disobey the law and even resort to force, and "the resort to arms by a nation when right can not otherwise be enforced corresponds, or should correspond, precisely to the acts of the individual man which have been cited; * * * ."

In the succeeding pages he points out many a fallacy of the too zealous enthusiast for arbitration, and clearly depicts the danger of obligatory arbitration. The strongest arguments on the other side have been squarely met, so that even where the author fails to convert to his own opinion, the reader who has withstood his logical deductions must feel renewed confidence in any opposed views which have withstood such a test.

After showing the inadequacy of the best system of law to provide for the changes which come with development and advance, the author —

> urged that it is not to be supposed that nations will antecedently submit themselves to a tribunal, the general principles of which have not been crystallized into a code of some sort. * * * (Page 58.)
>
> Where an antecedent body of accepted law is wanting, arbitration becomes a matter of personal beliefs or opinions on the part of the arbitrators; * * * . (Page 59.)

But we may object that this is but a question of degree. There would not be any need for arbitration unless there were either a difference of opinion as to what the code meant, or else as to whether some of its provisions were not at variance with the spirit of justice in which it must be interpreted.

To resolve this question mankind must always have recourse to "the personal beliefs or opinions" of men, or of one man when he casts the deciding vote. Force is the only method of solution. Will it not be more and more possible to secure men who shall approach nearer and nearer the ideal of the perfect judgment of mankind? Will not then his object be to discover the resultant of the opposed moral and physical forces? Will not the resultant or decision obtained in this manner approach with each advance in human intelligence and knowledge nearer and nearer to the truth? When the judge or arbitrator of forces errs beyond a certain degree the great forces of humanity will not be restrained by his decree, but in the great number of cases acquiescence in his decision will save the nations untold suffering. And this is the more true because it is very doubtful if at the present time either contestant in a war between world powers could survive. Like the bee, each great power may use its weapon only at the cost of its existence. But even this may perhaps be no argument against wars. The fall of particular political groups or nations is of little moment if the fear of such a fate has acted to impel the community of nations each and all to strain every nerve to attain the highest possible stage of development.

If the arbitrator is going to give a judicial decision based upon the strict application of an international code, the ascertaining of the resultant of which we have spoken will take the form of revisions of the code to allow for the shifting of forces so that the international code shall always be approximately in accord with the living forces of humanity or civilization, and this will give the resultant of the moral and physical forces of mankind of which we spoke.

The essay on "War from the Christian Standpoint" is interesting in showing how the man of war reconciles his profession with the tenets of Christ. It is diametrically opposed to the writings of Tolstoi, who is perhaps the greatest exponent of the doctrine of nonresistance.

The essay entitled "The Hague Conference; the Question of Immunity for Belligerent Merchant Shipping," which appeared last July in the National Review, defends the present practice of capturing belligerent merchant shipping. The author draws the distinction between the seizure of enemy private property and its capture when in circulation, the latter paralyzing the adversary and bringing him to terms.

At the end of the essay the author expresses his opinion (page 191) "that whatsoever tends to make war more effective tends to shorten it and to prevent it." Undoubtedly, but in the process of making war effective more important considerations should not be lost. For example, as a great part of the neutral carrying trade is in British bottoms a war in which Great Britain was involved would disturb the commerce of a neutral such as the United States to such a degree that it might make it necessary for the United States to depart from a neutral attitude in order to protect our interests, and the war, instead of being localized and brief, might in consequence become general and long drawn out.

In past ages wars were for the extermination of adversaries; later, they were for subjugation, and now they are to secure certain economical advantages. The effect upon the individual has grown less and less at the same time that the opinions of the individual exercise greater and greater influence. Modern society in its present highly organized state requires but a slight disturbance to bring the government to terms. Would it not be well to restrict the operations looking to this end to those which are least destructive of the means of communication, so as to make possible for belligerents the most rapid recovery from the effect of war to the universal advantage of mankind? By blockade rigidly effective, so that few ships of any kind could reach the great ports of a country, the circulation of its commerce would be so disturbed and arrested (though not destroyed) as to bring it quickly to submission. Private property and contraband of war might then go free.

This essay of Captain Mahan's exercised a great influence upon the delegates of many of the countries assembled at The Hague, and unfortunately did much to weaken the support given to Mr. Choate's proposition, embodying the traditional policy of our Government, to establish the inviolability of private property in naval war.

ELLERY C. STOWELL.

*Leyes comerciales y maritimas de la América Latina.* Comparadas entre si y con los códigos de España y las leyes de los Estados Unidos de América. Profusamente anotadas con la Legislación de España y con la Jurisprudencia Extranjera. By Clifford Stevens Walton. In five volumes, with appendices. Washington: Government Printing Office. 1907.

The recent visit of the Secretary of State to South America has resulted in bringing Latin-America into closer relations with the United

States, and it can not be doubted that the knowledge obtained at first hand, based as it is upon an understanding of the local conditions of the various states of Latin-America, will result in a greater sympathy with the aims and the purposes of all parties concerned. Heretofore we have discussed grave questions at arm's length; we have seen through the glass darkly. In order to meet the needs of Latin-America, and in order to conduct our business relations in such a way as to prevent litigation and misunderstanding, it is necessary to know in advance the local laws and regulations governing business transactions. Mr. Walton was therefore well advised and is to be congratulated upon the publication of the five volumes dealing with the commercial and maritime law of Latin-America. It will be henceforth a simple matter to ascertain the text of the law regulating the particular transaction by consulting the laws of Latin-America which Mr. Walton has industriously collected and annotated.

It is common knowledge that the laws of the United States can not be understood without constant reference to the common law of England and the various statutes correcting and modifying it, for in adopting the common law we naturally adopted it as modified by statute and as interpreted by the competent courts of Great Britain. In like manner the laws of Spain, either directly or indirectly, form the basis of Latin-American jurisprudence and the various codes of Latin-America are based upon the codes of Spain. Brazil and Haiti do not in reality form an exception, although Brazil is of Portuguese origin and Haiti has based its jurisprudence upon the civil code of France. The method adopted by Mr. Walton has been to print and annotate a particular portion of the Spanish code and to follow this by the codes of the various Latin-American states, alphabetically arranged. References are made to the code of Spain and much space is thus saved. The changes introduced in the codes of Latin-America are noted and in proper cases annotated, and the absence of corresponding provisions is likewise pointed out. The law of the United States is likewise given in alphabetical order. Statutes are quoted, decisions of courts are noted, and references made to the literature on the subject.

No attempt is made to analyze in detail this elaborate work; it is sufficient to call attention to its scope and to assure the reader that it is carefully compiled from the various official publications of the Latin-American countries. The entire text is in Spanish and the Spanish-American or Latin-American is put in possession, within the moderately short compass of five volumes, of the commercial and maritime law of the various Latin-American countries, and the American lawyer, with these volumes on his shelves, may consult without difficulty — indeed, with ease — the provisions of the law, which he must know in advance in order to be a safe counselor. The summary of the laws of the United States, likewise in Spanish, will be of service to the Latin-American who may wish in advance information concerning our system of jurisprudence.

James Brown Scott.

*Frontiers.* By The Right Honourable Lord Curzon of Kedleston, D. C. L., LL. D., F. R. S. The Roumanes Lecture, 1907. Oxford: At the Clarendon Press. 1907.

Attention is called to the admirable address on "Frontiers" delivered by Lord Curzon in the Sheldonian Theatre at Oxford on November 2, 1907. The learned Chancellor called attention to the fact that he had never been able to discover any literature dealing with frontiers, although frontiers "are the chief anxiety of nearly every foreign office in the civilized world, and are the subject of four out of every five political treaties or conventions that are now concluded; though as a branch of the science of government frontier policy is of the first practical importance, and has a more profound effect upon the peace or warfare of nations than any other factor, political or economical, there is yet no work or treatise in any language which, so far as I know, affects to treat of the subject as a whole."

After a brief introduction, Lord Curzon proceeds to consider what frontiers mean and what part they play in the life of nations, and in so doing devotes a few pages (5 to 11, inclusive) to the history of the subject. He then passes to the origin of frontiers and divides them into natural and artificial, stating that "the sea is the most uncompromising, the least alterable, and the most effective." As second in the list of natural frontiers he places deserts, "until modern times a barrier even more impassable than the sea."

He then considers a third type of natural frontiers, namely, mountains. While he admits that rivers are natural frontiers, he states that they are really not natural divisions "because people of the same race are apt to reside on both banks."

In discussing artificial frontiers he passes in review the commonest type of the barrier frontier, consisting of a palisade or mound or rampart or wall, showing that in ancient times the palisade or rampart or wall were the commonest illustration of the type; that in ancient times a common and widely diffused type was that of the intermediary or neutral zone, whereas in mediæval times marks or marches formed a common expedient. The learned author considers the nature of buffer states and the creation of neutralized communities. He then passes to an enumeration of the artificial frontiers in use at the present day among modern states, and finds them to be three in number:

> (1) What may be described as the pure astronomical frontier, following a parallel of latitude or a meridian of longitude; (2) a mathematical line connecting two points, the astronomical coordinates of which are specified; and (3) a frontier defined by reference to some existing and, as a rule, artificial feature or condition. Their common characteristic is that they are, as a rule, adopted for purposes of political convenience, that they are indifferent to physical or ethnological features, and that they are applied in new countries where the rights of communities or tribes have not been stereotyped, and where it is possible to deal in a rough and ready manner with unexplored and often uninhabited tracks. They are rarely found in Europe, or even in Asia, where either long settlement or conflict has, as a rule, resulted in boundaries of another type.

The concluding part of this admirable little treatise is devoted to a consideration of the modern expedients of protectorates, spheres of influence and of interest. Of this latter category as a whole he says:

> Of all the diplomatic forms or fictions which have latterly been described, it may be observed that the uniform tendency is for the weaker to crystallize into the harder shape. Spheres of interest tend to become spheres of influence; temporary leases to become perpetual; spheres of influence to develop into protectorates; protectorates to be the forerunners of complete incorporation. The process is not so immoral as it might at first sight appear; it is in reality an endeavor, sanctioned by general usage, to introduce formality and decorum into proceedings which, unless thus regulated and diffused, might endanger the peace of nations or too violently shock the conscience of the world.

The little treatise (it is only fifty-eight pages in extent) is an admirable example of the treatment of a great subject within a remarkably brief compass.

JAMES BROWN SCOTT.

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# THE SANCTION OF INTERNATIONAL LAW[1]

One accustomed to the administration of municipal law who turns his attention for the first time to the discussion of practical questions arising between nations and dependent upon the rules of international law, must be struck by a difference between the two systems which materially affects the intellectual processes involved in every discussion, and which is apparently fundamental.

The proofs and arguments adduced by the municipal lawyer are addressed to the object of setting in motion certain legal machinery which will result in a judicial judgment to be enforced by the entire power of the state over litigants subject to its jurisdiction and control. Before him lies a clear, certain, definite conclusion of the controversy, and for the finality and effectiveness of that conclusion the sheriff and the policeman stand always as guarantors in the last resort.

When the international lawyer, on the other hand, passes from that academic discussion in which he has no one to convince but himself, and proceeds to seek the establishment of rights or the redress of wrongs in a concrete case, he has apparently no objective point to which he can address his proofs or arguments, except the conscience and sense of justice of the opposing party to the controversy. In only rare, exceptional and peculiar cases, do the conclusions of the international lawyer, however, clearly demonstrated, have behind them the compulsory effect of possible war. In the vast majority of practical questions arising under the rules of international law there does not appear on the surface to be any reason why either party should abandon its own contention or yield against its own interest to the arguments of the other side. The action of each party in yielding or refusing to yield to the arguments of the other appears to be entirely dependent upon its own will and pleasure. This apparent absence of sanction for the enforcement of the rules of international law has led great authority to deny that those rules are entitled to be called law at all; and this apparent hopelessness of finality carries to the mind which limits its consideration to the procedure in each particular case, a certain sense of futility of argument.

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[1] Address delivered at the second annual meeting of the American Society of International Law, April 24, 1908.

Nevertheless, all the foreign offices of the civilized world are continually discussing with each other questions of international law, both public and private, cheerfully and hopefully marshaling facts furnishing evidence presenting arguments and building up records, designed to show that the rules of international law require such and such things to be done or such and such things to be left undone. And in countless cases nations are yielding to such arguments and shaping their conduct against their own apparent interests in the particular cases under discussion, in obedience to the rules which are shown to be applicable.

Why is it that nations are thus continually yielding to arguments with no apparent compulsion behind them, and before the force of such arguments abandoning purposes, modifying conduct, and giving redress for injuries? A careful consideration of this question seems to lead to the conclusion that the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and that there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law.

It is a mistake to assume that the sanction which secures obedience to the laws of the state consists exclusively or chiefly of the pains and penalties imposed by the law itself for its violation. It is only in exceptional cases that men refrain from crime through fear of fine or imprisonment. In the vast majority of cases men refrain from criminal conduct because they are unwilling to incur in the community in which they live the public condemnation and obloquy which would follow a repudiation of the standard of conduct prescribed by that community for its members. As a rule, when the law is broken the disgrace which follows conviction and punishment is more terrible than the actual physical effect of imprisonment or deprivation of property. Where it happens that the law and public opinion point different ways, the latter is invariably the stronger. I have seen a lad grown up among New York toughs break down and weep because sent to a reformatory instead of being sentenced to a

State's prison for a violation of law. The reformatory meant comparative ease, comfort, and opportunity for speedy return to entire freedom; the State's prison would have meant hard labor and long and severe confinement. Yet in his community of habitual criminals a term in State's prison was a proof of manhood and a title to distinction, while consignment to a reformatory was the treatment suited to immature boyhood. He preferred the punishment of manhood with what he deemed honor to the opportunity of youth with what he deemed disgrace. Not only is the effectiveness of the punishments denounced by law against crime derived chiefly from the public opinion which accompanies them, but those punishments themselves are but one form of the expression of public opinion. Laws are capable of enforcement only so far as they are in agreement with the opinions of the community in which they are to be enforced. As opinion changes old laws become obsolete and new standards force their way into the statute books. Laws passed, as they sometimes are, in advance of public opinion ordinarily wait for their enforcement until the progress of opinion has reached recognition of their value. The force of law is in the public opinion which prescribes it.

The impulse of conformity to the standard of the community and the dread of its condemnation are reinforced by the practical considerations which determine success or failure in life. Conformity to the standard of business integrity which obtains in the community is necessary to business success. It is this consideration far more frequently than the thought of the sheriff with a writ of execution that leads men to pay their debts and to keep their contracts. Social esteem and standing, power and high place in the professions, in public office, in all associated enterprise, depend upon conformity to the standards of conduct in the community. Loss of these is the most terrible penalty society can inflict. It is only for the occasional nonconformist that the sheriff and policeman are kept in reserve; and it is only because the nonconformists are occasional and comparatively few in number that the sheriff and the policeman can have any effect at all. For the great mass of mankind laws established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.

The rules of international law are enforced by the same kind of sanction, less certain and peremptory, but continually increasing in effectiveness of control. "A decent respect to the opinions of mankind" did not begin or end among nations with the American Declaration of Independence; but it is interesting that the first public national act in the New World should be an appeal to that universal international public opinion, the power and effectiveness of which the New World has done so much to promote.

In former times, each isolated nation, satisfied with its own opinion of itself and indifferent to the opinion of others, separated from all others by mutual ignorance and misjudgment, regarded only the physical power of other nations. Gibbon could say of the Byzantine Empire: "Alone in the universe, the self-satisfied pride of the Greeks was not disturbed by the comparison of foreign merit; and it is no wonder if they fainted in the race, since they had neither competitors to urge their speed nor judges to crown their victory." Now, however, there may be seen plainly the effects of a long-continued process which is breaking down the isolation of nations, permeating every country with better knowledge and understanding of every other country, spreading throughout the world a knowledge of each government's conduct to serve as a basis for criticism and judgment, and gradually creating a community of nations, in which standards of conduct are being established, and a world-wide public opinion is holding nations to conformity or condemning them for disregard of the established standards. The improved facilities for travel and transportation, the enormous increase of production and commerce, the revival of colonization and the growth of colonies on a gigantic scale, the severance of the laborer from the soil, accomplished by cheap steamship and railway transportation and the emigration agent, the flow and return of millions of emigrants across national lines, the amazing development of telegraphy and of the press, conveying and spreading instant information of every interesting event that happens in regions however remote — all have played their part in this change.

*Pari passu* with the breaking down of isolation, that makes a common public opinion possible, the building up of standards of conduct is being accomplished by the formulation and establishment of rules that are being gradually taken out of the domain of discussion into that of general acceptance — a process in which the recent conferences at The Hague have played a great and honorable part. There is no civilized country now which is not sensitive to this general opinion, none that is willing to subject itself to the discredit of standing brutally on its power to deny to other countries the benefit of recognized rules of right conduct. The deference shown to this international public opinion is in due proportion to a nation's greatness and advance in civilization. The nearest approach to defiance will be found among the most isolated and least civilized of countries, whose ignorance of the world prevents the effect of the world's opinion; and in every such country internal disorder, oppression, poverty, and wretchedness mark the penalties which warn mankind that the laws established by civilization for the guidance of national conduct can not be ignored with impunity.

National regard for international opinion is not caused by *amour propre* alone — not merely by desire for the approval and good opinion of mankind. Underlying the desire for approval and the aversion to general condemnation with nations as with the individual, there is a deep sense of interest, based partly upon the knowledge that mankind backs its opinions by its conduct and that nonconformity to the standard of nations means condemnation and isolation, and partly upon the knowledge that in the give and take of international affairs it is better for every nation to secure the protection of the law by complying with it than to forfeit the law's benefits by ignoring it.

Beyond all this there is a consciousness that in the most important affairs of nations, in their political status, the success of their undertakings and their processes of development, there is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation's character and conduct. The greatest and strongest governments recognize this influence and act with reference to it. They dread the moral isolation created by general adverse opinion and the unfriendly feeling that accompanies it, and they desire general approval and the kindly feeling that goes with it.

This is quite independent of any calculation upon a physical enforcement of the opinion of others. It is difficult to say just why such opinion is of importance, because it is always difficult to analyze the action of moral forces; but it remains true and is universally recognized that the nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power.

These are the considerations which determine the course of national conduct regarding the vast majority of questions to which are to be applied the rules of international law. The real sanction which enforces those rules is the injury which inevitably follows nonconformity to public opinion; while, for the occasional and violent or persistent lawbreaker, there always stands behind discussion the ultimate possibility of war, as the sheriff and the policeman await the occasional and comparatively rare violators of municipal law.

Of course, the force of public opinion can be brought to bear only upon comparatively simple questions and clearly ascertained and understood rights. Upon complicated or doubtful questions, as to which judgment is difficult, each party to the controversy can maintain its position of refusing to yield to the other's arguments without incurring public condemnation. Upon this class of questions the growth of arbitration furnishes a new and additional opportunity for opinion to act; because, however complicated the question in dispute may be, the proposition that it should be submitted to an impartial tribunal is exceedingly simple, and the proposition that the award of such a tribunal shall be complied with is equally simple, and the nation which refuses to submit a question properly the subject of arbitration naturally invites condemnation.

Manifestly, this power of international public opinion is exercised not so much by governments as by the people of each country whose opinions are interpreted in the press and determine the country's attitude towards the nation whose conduct is under consideration. International opinion is the consensus of individual opinion in the nations. The most certain way to promote obedience to the law of nations and to substitute the power of opinion for the power of armies and navies is, on the one hand, to foster that "decent respect to the opinions of mankind" which found place in the great Declaration of 1776, and, on the other hand, to spread among the people of every country a just appreciation of international rights and duties and a knowledge of the principles and rules of international law to which national conduct ought to conform; so that the general opinion, whose approval or condemnation supplies the sanction for the law, may be sound and just and worthy of respect.

Elihu Root.

# THE PROPOSED INTERNATIONAL PRIZE COURT AND SOME OF ITS DIFFICULTIES

The twelfth convention adopted by the Hague Conference of 1907 provides for the establishment of an International Prize Court to which appeals may be carried in certain instances from the prize courts of the captors. The proposal for such a convention was presented very early in the proceedings of the conference. On Wednesday, June 19, at its second plenary sitting, Baron Marschall Von Bieberstein, first delegate of Germany, intimated that he had been charged by his Government to present a project which had for its object the establishment of a supreme international prize court of appeal in time of naval war. Sir E. Fry, chief delegate of Great Britain, said that he had like instructions and would gladly collaborate with Baron Marschall. "A delegate of the United States gave cordial support to the Anglo-American project."[1] On Saturday morning, June 22, the special committee dealing with arbitration and the International Committee of Inquiry met, M. Bourgeois presiding, and the separate proposals as above mentioned were submitted by Baron Marschall on behalf of Germany and Sir E. Fry on behalf of Great Britain. Two subcommittees were appointed to deal with these proposals. The German plan was for a tribunal *ad hoc,* to be instituted in time of war, the members to be practically nominated by the two belligerent powers. The British plan provided permanent judges and that each signatory power of the Hague convention whose mercantile marine at the date of signature of the projected agreement exceeded 800,000 tons should designate, for a place upon this tribunal, within three months after ratification of the present act, a jurisconsult of recognized competence in questions of international maritime law, enjoying the highest moral reputation and disposed to accept the functions of a judge in this court.[2] The advantages claimed for the British proposal were expert and neutral judges and the establishment of the court in time of peace. When the debate was opened on these proposals in the subcommittee on July 4, M. Keiroku Tsudzuki, of Japan, "hoped that the conference would first arrive at an agreement on the codification of rules affecting prize cases before instituting an international court."[3] After debate on July 11 the chairman, M. Bourgeois, recognized the existence of unanimity in favor of the establishment of a prize court "and echoed the aspirations for uniformity of prize legislation." The rival schemes were referred to a *comité de redaction.* It became also understood that private negotiations gave hope of an approximation of the views of the different delegations[4] and the success of these negotiations was announced July 25.[5] Finally, September 21, at its sixth plenary sitting, a joint proposition from Germany, the United States, France, and Great Britain having been presented, the conference adopted the convention for the institution of an International Prize Court of Appeal by thirty-seven votes to one (Brazil), with six abstentions (Japan, Russia, Turkey, Siam, Venezuela, and Santo Domingo). Brazil alone voted against the project, because she was dissatisfied with her share in the appointment of the judges, and Japan and Russia abstained from voting apparently on the ground that a codification of maritime law ought to precede the institution of such a court.[6] The court provided for conformed in the main to the British proposal. It will consist of fifteen judges appointed for terms of six years. The appointees of Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia will invariably be members of the court. Those appointed by other powers sit according to a scheme of rotation,[7] being divided into six groups. A belligerent power having a case before the court may always have a judge in the court, and each nation involved is represented by a naval officer of rank, who sits as an assessor with advisory functions. There may be adjudication by the national tribunals in not more than two instances. The statutes of the captor decide whether there may be an appeal after decision by a court of appeal or the supreme court. If the captor's courts give no final decision within two years from the capture the International Court may be directly seized of the case. The right of appeal may be, in prescribed cases, exercised by a neutral power or individual or an individual dependent upon an enemy power. The court is to sit at The Hague unless forced to sit elsewhere, and then only with the consent of the belligerents. The judges are to be paid through the International Bureau at The Hague 100 florins per diem during the exercise of their functions, and also their traveling expenses, and shall receive nothing from their own country as members of the court.

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[1] Weekly edition of the London Times, June 21, 1907, p. 2, supplement.

[2] Weekly London Times, June 23, 1907, p. 405.

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[3] Same, July 12, 1907, p. 2, supplement.

[4] Same, July 19, 1907, pp. 458–459; July 26, 1907, p. 468.

[5] Same, August 2, 1907, p. 2, supplement.

[6] Same, September 27, 1907, p. 613, and Green Bag, November, 1907, pp. 654–658.

[7] Weekly London Times, August 30, 1907, p. 549. See also the excellent article by Prof. Amos S. Hershey concerning this court, giving full details of the nine articles of the convention. Green Bag for November, 1907, p. 652.

The court decides what language shall be used, but the language of the court appealed from may always be used.

The deliberations of the court are secret; the discussions public, unless a litigant asks secrecy. Decisions are by a majority of judges present. Each party pays his own counsel, and the losing party pays the cost of the proceedings and one-hundredth of the value of the object in litigation as a contribution to the general expenses of the court. The general expenses of the court are borne by the signatory powers in proportion to their participation in its action and "the signatory powers agree to submit in good faith to the decisions of the International Prize Court and to execute them with as little delay as possible."

The difficulty due to the variety of rules, in many respects directly conflicting, recognized in the courts of different countries was not solved. The courts of England and America are very largely in agreement, Sir William Scott (Lord Stowell) being the principal creator of the law for each of them, and the difference between the text-writers of the two countries in some minor particulars seeming not to be shared by the Governments or the courts. The proposed court is to decide according to conventions between the parties; failing these, according to "the rules of international law." If no settled rules of international law exist, then upon "principles of justice and equity."

Most cases in the prize courts affecting neutrals arise under the rules as to contraband or blockade. As to what is contraband, the extreme divergence of views and claims was most recently evidenced in the Russo-Japanese war when the list of articles proclaimed as contraband by Russia was promptly protested by Great Britain and the United States. It can not be claimed that there is unanimity as to the rules concerning sailing under convoy and the acceptance of the statement of the officer in command of the convoy, but the very radical difference, which it is here wished more fully to discuss, is that as to breach of blockade and consequent liability to seizure and condemnation.

By the American rule the neutral ship which starts from her home port to deliver a cargo in a known blockaded port, the blockade having been duly proclaimed, whether delivery is to be by herself, directly breaking the blockade, or by serving as one of a chain of vessels which by transshipment effects the same purpose, is subject to seizure and to the condemnation of ship and cargo, by the blockading belligerent, as soon as she passes out from the territorial waters in which her voyage begins.[8] No warning from the blockading fleet is required, and even where, as in the blockade of the Confederate coast by the proclamation of President Lincoln in 1861, provision was made for such warning it was held not intended to apply to those which sailed with knowledge of the blockade.

In the case of the steamer *Adula*,[9] seized during the recent Spanish-American war, the doctrine was fully affirmed as to that British steamer brought in on the charge of attempting to run the blockade of Guantanamo Bay, Cuba, June 29, 1898. Her master and charterer had full knowledge of the blockade, but the master was instructed to stop at once when signaled by the American vessels and to then acquaint the officers of such vessels with his voyage, claimed to be for relief of refugees, and, it was believed, he would be allowed to enter. The steamer, however, was condemned, and this was affirmed upon appeal (1899) and it was expressly held by the Supreme Court of the United States that a master having knowledge of a blockade is not at liberty even to approach the blockaded port for the purpose of inquiry, since such liberty would not fail to lead to attempts to violate the blockade under such pretext. Counsel for claimant (Hon. Everett P. Wheeler, lately chairman of the standing committee on International Law of the American Bar Association) urged that the adhesion of the United States Government to the Declaration of Paris abolishing privateering introduced a change into our laws on this subject. Counsel based this claim upon an extract from a French treatise upon international law (Pistoye and Duverdy, vol. 1, p. 375) in which the modern law is said, in consequence of the Declaration of Paris, to require that "a vessel must be notified to depart from the blockaded port before she can be captured and that the contrary rule was the result of the British orders in council during the Napoleonic wars, which is now given up by that country." The court wholly repudiated the change of international law contended for and said of the authority cited:

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[8] *The Circassian*, 2 Wall., 135; *The Hiawatha* (Prize Cases), 2 Black, 677; *The Admiral*, 3 Wall., 603; 7 Moore's Dig. Inter. Law, 821; and Scott's Cases Inter. Law, note, pp. 820 and 828.

[9] 176 United States, 361.

> We can not, however, accept this as overruling in any particular the prior decisions of this court in the cases above cited to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We can not change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.[10]

There was a strong dissenting opinion in the above case by Mr. Justice Shiras, in which three other justices concurred, but the rule as above was admitted as to proclaimed blockades. It should be added that the President did not find himself justified in exercising clemency in this case.[11] There has been no belligerent blockade by the United States or Great Britain, it is submitted, since that with which this modern decision by our highest court so fully deals. It is the authoritative statement of the English and American rule upon the subject and fully recognizes its conflict with the French rule.

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[10] The court cites, in support of such doctrine, Yeaton v. Fry, 5 Cranch, 335; 3 L. Ed. 117; *The Circassian*, 2 Wall., 135, *sub. nom.*, Hunter v. United States; 17 L. Ed., 796; *The Frederick Molke*, 1 C. Rob., 86; *The Columbia*, 1 C. Rob., 154; *The Fortune*, 2 C. Rob., 94; Wheaton Captures, 196. And as to approaching the port exposing to capture, *The Admiral*, 3 Wall., 603, *sub nom.*, *The Admiral* v. United States, 18 L. Ed., 58; Prize Cases, 2 Black, 635, 677, *sub. nom.*, Preciat v. United States, 17 L. Ed., 459, 479; Duer, Marine Ins., 661; *The Cheshire*, 3 Wall., 231, *sub. nom.*, *The Cheshire* v. United States, 18 L. Ed., 175; *The James Cook*, Edw. Adm., 261; *The Josephine*, 3 Wall., 83, *sub. nom.*, *Queyrouze* v. United States, 18 L. Ed., 65; *The Spes*, 5, C. Rob., 76; *The Betsy*, 1, C. Rob., 334; *The Neptunus*, 2, C. Rob., 110; *The Little William*, 1 Acton, 141, 161; Sperry v. Delaware Ins. Co., 2 Wash. C. C., 243; Fed. Cas. No, 13236.

That the distinction between the French or continental rule is not abandoned in England any more than in America, appears from all the English writers.[12] The usage of France, Italy, Sweden, and Spain requires special notification to be given a neutral vessel by the blockading squadron in all cases before she can be guilty of a breach. The French rule was very fully announced by Count Molé in 1838 and is fully set out and maintained by Ortolan:[13]

> Indépendamment de la notification officielle et diplomatique d'un blocus, tout Navire qui se présente devant le port bloqué doit recevoir du commandant des bâtiments de guerre chargés de faire respecter le blocus, l'avertissement qui est à la fois dans l'intérêt de ce navire et dans l'intérêt de la responsabilité de l'officier commis à l'exécution du blocus.

The effectiveness of diplomatic notification has been increased and the need of personal notification from the blockading squadron diminished by the modern newspaper and electric telegraph, and its adequacy on those grounds is maintained by Sir H. Maine, and Messrs. Smith and Sibley show[14] that such eminent continental writers as Bluntschli (S. 832) and Heffter (S. 156), as well as the Institute of International Law, consider special notification now unnecessary.[15] Yet they show that France, in her treaties with seven of the principal South American states, provides that special notification is necessary. The Japanese proclaimed their blockade of Port Arthur, and this fact is claimed by Messrs. Smith and Sibley to intimate that Japan is in agreement with the English and American rule.[16]

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[11] 7 Moore's Dig., Inter. Law, p. 822, Mr. Hill, Acting Secretary State, to Attorney-General, February 13, 1901.

[12] See Hall's Inter. Law (ed. 1904), p. 708; Wheaton's Inter. Law, 4th Eng. ed. (1904), notes by J. Beresford Atlay, p. 700, citing and relying on the case of *The Adula*, supra; 3 Phillimore's Inter. Law, p. 501; 2 Halleck's Inter. Law, pp. 224–225 and 230; International Law as Interpreted during Russo-Japanese war, Smith and Sibley, pp. 330 and 351; 2 Oppenheim Inter. Law, p. 405 (1905).

[13] Smith and Sibley (supra), p. 331; Diplomatie de la Mer, tome 2, p. 307.

[14] Inter. Law, pp. 108–109; Hall's Inter. Law, p. 698; Smith and Sibley, p. 358.

The temporary absence of the blockading force, as by reason of stress of weather or pursuit of the enemy or vessels attempting entry, does not terminate the blockade by English and American rule, but absence for any cause is claimed by France to have that effect.[17]

The right to visit and search a neutral ship sailing under convoy of the ships of war of their own nation and the obligation to accept the statement of the commander of the convoy as to the innocent character of the cargo is a matter of controversy.[18] Hall shows that as usual "English and American writers and judges are fully in accord; on the continent of Europe, Germany, Austria, Spain, and Italy, in addition to the Baltic powers and France, provide by their naval regulations that the declaration of a convoying officer shall be accepted." Great Britain, on the other hand, adheres to the practice upon which she has always acted. Continental jurists are almost unanimous in maintaining the exemption from visits of convoyed ships not only on principle to be advocated, but as an established rule of law.[19]

It is with such radical differences as these that the International Prize Court must deal. The judges from the eight principal nations are always called to serve. The seven other judges are taken from the lesser powers in rotation, as we have seen. The strong probability arises that the majority of these judges would not determine the recognized rules of international law in accord with the Anglo-American understanding. In fact, it seems likely that the majority will hold the generally recognized rules to be in accord with the views of the majority of the states, which is perhaps quite logical. If they do not find generally recognized rules they are to decide in accordance with the general principles of justice and equity. But the jurists of every country, it may be said, have formed the juridical views of that country, or are formed by them. It is impossible to conceive that the continental jurists, on the one hand, consider the views as to prize law, which they have evolved, announced, and defended during so long a time, either contrary to the general views or contrary to justice and equity. The same argument applies to the English and American jurists. We conclude that the latter, yoked with a hopeless majority of judicial colleagues deeply committed to conflicting views, must be overborne and that the strong majority of this international court is likely to hold against the Anglo-American rules.

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[15] Smith and Sibley, p. 358.

[16] Same, p. 363; see also 2 Oppenheim Inter. Law, p. 405.

[17] Same, pp. 365–366; citing expressly the instructions of the French Government, 1870, and Ortolan and Hautefeuille.

[18] Hall's Inter. Law, 5th ed. (1904), pp. 718–725.

[19] Hall's Inter. Law, 5th ed., p. 724, citing Admiralty Manual of Prize Law (Holland, p. 2) for the English rule. See also Calvo, Le Droit International, tome 5 (§ 2972 to § 2981), where he gives the history of the rule and collects the opinion of writers of Europe and America.

Does that mean the substantial doing away with effective blockade? According to the Anglo-American doctrine the blockade can be extended "to any necessary portion of the high seas outside the 3-mile limit" as well as to waters within, but this view as to nonterritorial waters is not supported by the continental view, which regards the blockade as merely "the displacement by a belligerent of the territorial jurisdiction of his blockaded enemy," which therefore "can not be carried on beyond the limits of territorial waters." [20]

The London Times, of September 30, 1907, editorially says that the conference has sanctioned "an International Prize Court with an extremely wide jurisdiction. We do not hesitate to affirm that in its present form the project is utterly inadmissible by this country."

The belief is widespread that the methods of modern navigation, the aids of steam and electricity, have increased the difficulty of maintaining an effective blockade; that the increased range of guns and searchlights and increased speed of cruisers have been more than met by the speed and certainty of locomotion and information obtainable by modern blockade runners. Thus, Mr. Hall[21] has said, speaking of blockades in general in connection with the greatest blockade of history: "The experience of the civil war in America has proved the use of steam to assist so powerfully in their evasion as to render it unwise to shackle the belligerent with too severe restrictions." Sir Henry Maine said of this same blockade: "Steam also greatly facilitated the operation of the neutral blockade runners;" and, again, Mr. Hall says:[22] "The practice of England and the United States is unquestionably better suited than that of France to the present condition of navigation." He shows in a learned note that Bluntschli and Heffter partially adopt the English practice, and quotes Chief Justice Chase in *The Circassian,*[23] where, speaking for the court, he declared that "we are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbors, and blockade running from neutral ports seems to have been organized as a business, and almost raised into a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights."

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[20] Taylor's Inter. Law, S. 677, citing Hautefeuille Droits des Nations Neutres, Tit. IX, ch. 1, § 1. Ortolan Diplomatie de La Mer 11, Ch. IX; Calvo, § 2567.

Notwithstanding, during the blockade of the Confederate coast, the Anglo-American rules were applied in their full force and, as was claimed by foreign writers, in some cases unduly extended, a great and lucrative trade was maintained with the blockaded region, and a large fleet of vessels, mainly British, was profitably employed in this precarious commerce. Yet such vessels and cargoes were exposed to all the penalties of condemnation from the moment they left their home port with intent directly or indirectly to effect a breach of the blockade. If, as under the continental rule, the whole voyage could have been prosecuted with perfect security until the vessel had been hailed by the blockading squadron and given personal warning when at the entrance of the destined port, it is obvious that the percentage of captures would have been vastly reduced and the successful breaches have been as vastly increased. The blockade of the southern coast would have been substantially a nullity, inflicting some inconvenience but almost no loss. There can be no doubt that the blockade, by almost destroying the export trade, especially of cotton — the staple of the Confederacy — and greatly crippling the import trade, was among the greatest forces tending to the downfall of the Confederate power [24] and produced that result in as bloodless a way as was possible.

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[21] Inter. Law, 5th ed., p. 704.

[22] Hall's Inter. Law, 5th ed., p. 698.

[23] 2 Wallace, 151.

Even with inferior propelling power blockade running has been lately effective. During the blockade of Port Arthur "hundreds of Chinese junks, propelled by ten or twelve oarsmen, found their way into Port Arthur from Chifu, Teng-chan-fu, and Tientsin with tons of fresh provisions, which they landed on the low land at the remoter side of the western harbor." [25]

The danger from floating mines and from attacks by torpedo boats compels the modern blockading squadron to operate from a point far out at sea. Thus, the Japanese squadron blockading Port Arthur, under the prudent and able conduct of Admiral Togo, was so far off shore that when Admiral Vitoft sallied forth from the port in August, 1904, he did not even sight the Japanese squadron until after several hours steaming,[26] and Lord Nelson's rule, even under the old conditions, was that the blockading squadron ought never to be seen from the blockaded port.[27] As Messrs. Smith and Sibley point out, the whole experience at Port Arthur illustrates the impossibility, under modern conditions, of conducting a blockade, as Hautefeuille contended was obligatory, entirely within the limits of marginal seas in accord with the French views.[28]

Dr. T. J. Lawrence, lecturer on international law at the Royal Naval College, Greenwich, says of blockade: [29]

> Under modern conditions of navigation and warfare the endeavor to make it effective is far more dangerous to the blockaders than to the

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[24] Smith and Sibley, p. 333.

[25] *Id.*, Inter. Law, Russo-Japanese War, p. 321, quoting London Times December 9, 1904.

[26] Smith and Sibley, p. 322.

[27] *Id.*, p. 322 and note 1.

[28] Smith and Sibley, p. 322.

[29] War and Diplomacy in the Far East, p. 58.

blockaded wherever there is in the port a force of torpedo boats and destroyers able to get out and handled with even moderate skill and dash. They ought to keep the enemy's battleships at least 50 miles away during the night, and it is at night that the attempts to run in or out will be made. The blockading cruisers may perhaps venture to patrol at 30 miles distance and the destroyers and torpedo boats will be nearer still. The mosquito fleet of the blockaded side will constantly skirmish with them and use every effort to draw them away from the channels through which it has reason to believe blockade runners are advancing. The chances are strongly in favor of any swift vessel in an attempt to run in or out. Whereas if the commander of the blockading fleet draws his cordon of ships sufficiently near the port to make ingress or egress really dangerous, he risks their destruction by mines and torpedoes, to say nothing of the danger of their coming during a chase under the guns of any land defenses.

The suggestion of Mr. Hall[30] is that "if it is wished altogether to deprive blockades of efficacy, it would be franker and better to propose to sweep them away altogether," rather than to shackle them further.

During almost a century the great blockades have been mainly instituted by England and America and the practical dealing with the legal questions arising out of blockades has of necessity been largely left to their courts. If, by the newly proposed international court, these rules are to be overturned, it may be considered as almost the destruction of a powerful means of compelling submission, less bloody and cruel than battle — one which gives an advantage to the great maritime states and so to those most humanized and pacified by commerce.

Moreover, the operation of blockade is apt to prove highly beneficent in the support of established governments against insurrection. The navy is apt to be in the hands of the government. The government is apt to be better supplied in all ways than the insurrectionary forces. If the government can effectively blockade the ports of the insurgents the resistance can be minimized and the restoration of peace hastened with the least suffering or bloodshed, exactly as by the great blockade of the Confederate coast. Any nation having remote and extensive colonies, like England (and the United States now has great island domains), should especially seek to maintain the blockade in full efficiency, especially if it is, again like England and the United States, a great naval power. If Australia, Ceylon, Borneo, or Jamaica were in revolt against the authority of England, what more efficient or less-embittering means to compel submission than a blockade of the rebellious ports? The same is true — perhaps in a less striking degree on account of their land communications, but yet true — as to India, Canada, and British South Africa. Perhaps such a revolt is not to be deemed a possibility. The existence of the United States and (apart from the present good feeling) the story of its origin as an independent power strongly supports the possibility of such a revolt and of its success if combined with foreign support. The war of the Confederacy, closed a little over forty years ago, illustrated such possibility even in the far more close and vital union of the States of the American Union. There, the conflicts on land, the devastation of military operations, like Sherman's march to the sea, were far more sanguinary and the wounds occasioned far less easily healed than the contests or injury resulting from the naval blockade. In giving up blockade according to Anglo-American rules, efficient blockade is abandoned, and thus great naval powers surrender the least cruel and most potent means of overcoming rebellion, which has progressed so far as to be recognized as war. The subdivision of the great powers may be desired by the lesser powers which they overshadow, but it would probably not conduce to the peace or plenty of the world or the tranquillity of the seas. The tendency of the times seems distinctly the other way, and it is hoped that it is a beneficent tendency. The past ten years have certainly seen great extensions of territory for both Great Britain and the United States.

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[30] Page 704.

The validity of the capture is to be in the first instance determined in the prize court of the captor, as at present. The settled policy and practice of Great Britain and the United States in such adjudications is, as we have said, to decide according to the understanding of international law adopted by the national courts of the captor and not to modify this upon any showing that a different understanding prevails in the greater number of civilized nations. The court of the captor would then decide according to local understanding. On appeal would the International Court follow the same rule? It can only be said that there is nothing in the language of the twelfth convention adopted at The Hague which would so indicate. It is submitted that a principal object of the proposed International Prize Court was of course to do away with inconsistent and divergent local rules and to make the prize laws of the world congruous and uniform.

The Edinburgh Review (January, 1908) says very frankly on this subject: "An exclusive national jurisdiction is an anomaly, and there is no good reason to preserve the anomaly any longer than vital national interests require."

Speaking of the court Professor Westlake, the veteran English scholar, whose eighty years have been full of honor and learning, says in the Quarterly Review for January (page 240):

> The greatest difficulty arises from the very fact which is the greatest source of the necessity, namely, the divergent views of prize law entertained in different countries. What is the law which the International Court shall administer? For example, is the notice of blockade to which a ship desiring to enter a blockaded port is entitled to be measured by the British or the French rules? Is conditional contraband to be allowed? If not, can coal and provisions ever be absolute contraband? Does the declaration of the commander of a neutral convoy exclude the right of search?

He points out that codification of the prize laws was one way to solve these difficulties, and says the British delegation was reported to have proposed at the first meeting "to suspend discussion of that question on account of the profound divergence between continental and Anglo-American systems, both long practiced." He says (page 241) M. Renault, as the representative of the drafting committee, said: "In default of an international rule firmly established the international jurisdiction will apply the law of the captor." Professor Westlake says further, very cogently: "It will be utterly unjuridical if this appeal court reverses the prize court of first instance when that has entered a judgment it was right in giving." He further points out the probability of a majority of the judges "representing the system adverse to the Anglo-American Governments." He says the general expression in England is against the ratification of this convention, and says it should be amended so as to make the law of the captor state the law to be applied on the international appeal.

With great deference the writer would point out a most potent precedent which does not wholly agree with the suggestion that the lower court should not be reversed if it was right in entering the judgment appealed from, if we interpret the word "right" as meaning in accord with local law. The Supreme Court of the United States has repeatedly held that it will not be bound by a rule of decision, adopted in the State courts, in accordance with which the decision appealed from has been rendered, if the subject is one involving general rules of law — for instance, commercial law, which is sometimes called a branch of international law. The higher court will, in such cases, decide according to its own views and will not be bound even by settled precedents long adhered to in the State.

As early as 1842, in the leading case of Swift *v.* Tyson,[31] it held that the rule of New York might be fully settled by judicial decision, that a taker of negotiable paper in payment of a preexisting debt was not a holder for value, yet the Supreme Court of the United States would not consider that doctrine obligatory upon it in a case coming from New York. The court, *per* Mr. Justice Story, holds the true interpretation and effect of instruments of a commercial nature —

> are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they can not furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R., 882, 887, to be in a great measure not the law of a single country only, but of the commercial world. "*Non erit alia lex Romae, alia Athenis, alia nunc, alia post hac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

An opinion of the Supreme Court pronounced by Mr. Justice Story is, it is submitted, very high evidence of juridical practice.

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[31] 16 Peters, p. 1.

The above doctrine was most fully affirmed by the same court in Oates v. National Bank[32] in 1879, and in Railroad Co. v. National Bank[33] in 1880. In Burgess v. Seligman[34] the doctrine was discussed, discriminated, and approved, and the court, *per* Mr. Justice Bradley, after showing how far it would go in the display of comity to the State court, declares, in language peculiarly appropriate as to the proposed International Prize Court: "As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." In Baltimore and Ohio Railroad Co. v. Baugh[35] in 1893 Justice Brewer, speaking for the court, reviews many decisions and shows that the rule determining who are fellow-servants is governed by general and not local law, and that the federal courts are not controlled by the State decisions, but are free to exercise an independent judgment. A like rule was applied in determining the validity of county bonds in the hands of innocent buyers, and the court refused to be bound by State decisions in Commissioner v. Coler.[36] Decisions to like effect might be indefinitely collated, but these are sufficient. It is believed they strongly support the right of the proposed court to exercise an "independent judgment" uncontrolled by the decisions of the courts of the captor's country.

As Mr. Hannis Taylor has observed:[37] "As the largest experience in the actual conduct of blockades during the last century fell to the lot of Great Britain and the United States, a certain practical value should attach to a set of principles recognized by both as necessary for the maintenance of a practice which refuses to shackle belligerents with too severe and impracticable restrictions." Messrs. Smith and

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[32] 100 United States, 239.
[33] 102 United States, 14.
[34] 107 United States, 20.
[35] 13 Sup. Ct. R., 914.
[36] 23 Sup. Ct. R., 811.
[37] Inter. Law, S. 676.

Sibley[38] advance the view that "the extraordinary success of the operations of the British fleet in the great war are to be attributed partly to the fact of diplomatic notification of blockade. On one occasion Lord Stowell had eight hundred cases in arrears,[39] a fact which attests the success of the navy in arresting blockade runners."

During the blockade of Port Arthur in 1904, the most recent blockade, twenty-three vessels were captured attempting to run the blockade,[40] and it is believed that the experience of the Japanese as to that blockade by no means indicates "that blockades are likely to be infrequent. The growth of naval power in different countries in modern times seems to point to a contrary conclusion."[41] It appears that constructive notice of the blockade is sufficient for condemnation in case of attempted breach under the Japanese rules,[42] so that the sufficiency of this blockade was maintained under rules kindred with the Anglo-American, although not going to the same length.

The Edinburgh Review for January of this year mentions that the defense committee expects much of blockade as a weapon of war.

Dr. Paul Reinsch suggests that the adoption of the proposal as to this International Prize Court was perhaps due to the fact that the conference "undoubtedly felt that amidst all the wreckage it was necessary to achieve some positive results." The condition it seeks to foster has some resemblance to "that state of things not yet seen in the world" mentioned by Sir W. Scott — "that of a military war and a commercial peace."[43]

The difficulties mentioned were obvious from the first and have been alluded to very generally by writers who have dealt with the subject.[44]

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[38] Pages 357–358.

[39] Citing "Per Dr. Stephen Lushington in the Leucade" (1885), 2 Spinks, 228, 238.

[40] Smith and Sibley, p. 322, citing the London Times, January 24, 1905.

[41] Smith and Sibley, p. 322.

[42] 2 Oppenheim Inter. Law, p. 412, citing Japanese Prize Law, article 30.

[43] *The Maria*, 1, C. Robinson, 340; Scott's Cases, 858.

[44] Columbia Law Rev., February, 1908, p. 113; Amer. Pol. Sc. Quart., February, 1908, p. 209; Quarterly Rev., January, 1908, p. 240; Edinburgh Rev., January, 1908, p. 246; Green Bag, November, 1907, p. 655, where Prof. Hershey sets out the remarks of M. Renault in presenting the report. See also Editorial, London Times, September 30, 1907.

Prof. T. E. Holland, of Oxford (the Law Quarterly Review, January, 1908, p. 79), says the convention establishing this court —

> Contains within itself the seeds of mortality, in the article which provides that where international law is silent the court is to decide "in accordance with the general principles of justice and equity." On the objectionable character of such a provision, as at once ambiguous, and empowering a court, in which foreigners would be in a majority of eight to one, to adopt the continental rather than the British view on unsettled questions of prize law, the present writer does not here propose to add anything to what he has written elsewhere, both before and after the meeting of the conference.

A note is added, signed with the initials F. P. — undoubtedly the distinguished editor of the Quarterly, Sir F. Pollock — saying as to these "principles," while a century ago they would have meant the principles of Roman prætorian law supplemented by the publicist, "that he agrees with Professor Holland that at this day nobody knows in what sense they would be understood or applied."

It is submitted in the interest of peace, and for the prevention rather than the increase of bloodshed, that one of the most pacific forms of belligerent coercion, if we may so speak, ought not in effect to be abolished; that therefore some modification or amendment, preserving the Anglo-American rule in British or American captures, even in the Prize Court of International Appeal, ought to be provided, and that the suggestion of amendment made by Professor Westlake, one of the ripest living scholars upon the subject, merits support.

The fact that thirty-two years ago, in 1876, Professor Westlake made a proposal to the Institute of International Law[45] for the examination of a project to organize an international prize court proves the maturity of his consideration of the subject and the fact that that organization of eminent specialists, as a preliminary to the recommendation of such a tribunal, in the succeeding year advised *"De formuler par traité les principes généraux en matière de prises,"*[46] further accents the necessities of the case.

The London Times, in the editorial already cited, demands modification of the general project, yet, alluding to the institution of this tribunal, speaks of the belief that "a blessed precedent would be established for the indefinite extension of the principle of judicial decision to other controversies between nations. Any step seeming to tend towards an approximation to that ideal must forcibly appeal to the best spirits of our time." Yet it further characterizes that convention as an abandoning of vital rights "to the control of a court with power and with inclination to whittle them away." After saying that it can not justify the convention without further limitation, it closes with these somewhat insular sentiments: "We can not give any foreigners *carte blanche* to make laws for our fleet and to shorten at their discretion our arm upon the sea."

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[45] Problems of Inter. Practice and Diplomacy, by Sir T. Barclay, p. 105.

[46] Same, p. 105.

Already England has called a conference of nations to consider the codification of the law of prize, and our State Department has given out that the United States will participate. The task attempted is no less difficult than important. The results of the conference must be anticipated with anxiety and interest.

We ought not, however, to overlook the fact, of paramount importance, that in this International Prize Court appears a new creation of vast possibilities as the beginning of a new judicial international system, namely, "a true international tribunal, with obligatory jurisdiction."[47]

No achievement in the whole history of international negotiation can be recalled which gives promise of weightier or more beneficent consequence. It is the great step forward in the reign of law and order in the chaos of international affairs. Whatever difficulties may be foreseen or modifications sought, this fruitful beginning of progress ought not to be abandoned or its significance lessened or forgot.[48]

CHARLES NOBLE GREGORY.

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[47] Dr. Paul S. Reinsch, Pol. Sc. Rev., February, 1908, p. 218.

[48] The Hon. Henry Billings Brown, Associate Justice of the Supreme Court of the United States (retired), has recently expressed a weighty doubt as to the constitutionality of any convention giving an appeal from the Supreme Court of the United States, since the Constitution vests the judicial power of the United States "in the Supreme Court and in such *inferior* courts as the Congress may from time to time ordain and establish."

# THE PROPOSED INTERNATIONAL PRIZE COURT

Had the Second Hague Conference done nothing more than adopt the convention for the establishment of an International Prize Court, it would have sufficiently justified its being called together and refuted the criticisms of those who, because it did not accomplish all its most enthusiastic supporters desired, have sought to belittle its results. It marks an important step forward in the adjustment of international differences. It provides for the first time, so far as I know, for the compulsory arbitration of certain questions, though of a limited class, and establishes a court which shall have a superior jurisdiction over the courts of the signatory powers.

The convention is not only significant in this particular, but because of its potentiality in the possible creation of other courts of more enlarged powers, which may ultimately go far toward the peaceful settlement of all international disputes which do not involve the integrity of the territory or the vital interests or honor of the particular powers. These are generally admitted to be beyond the scope of arbitration.

This convention was the outcome of two propositions — one by the German delegation for the establishment of a high international court of prizes, and the other by the British delegation for a permanent court of international appeals. Both these delegations agreed, and indeed it was the opinion of the entire conference, that there was a clear distinction between land and sea operations, in the fact that the former are carried on against the enemy alone, and require no judicial authorization; while the latter, dealing as they do with the property of neutrals who are alleged to have violated their neutrality, require a judicial determination both of the question of violation and of the fact of neutral ownership. It is only by such determination that diplomatic reclamations can be avoided. Necessarily, these proceedings must be carried on in a court of the belligerent captor. No captor could be expected to send his prize to a port of the country to which she belonged, for condemnation, since every objection made to the partiality of the one would be equally applicable to the other. Hence, from time immemorial, the courts of the capturing power have asserted the jurisdiction of determining the validity of the capture. While no suspicion may attach to the integrity or impartiality of these courts, their judgments are largely governed by the local law, which in this respect may differ from the international law. That the national courts should differ among themselves with respect to the rights of neutrals is no more than would naturally be expected from the fact that one court may belong to a strong naval state, interested in enlarging belligerent powers, while another may belong to a neutral state, enjoying a large trade with the belligerents. If any court dealing with prize cases can be suspected of partiality, it would naturally be that of the belligerent captor, since to the ordinary motives which bias the opinions of even the best of men are added those of patriotism and a desire to encourage that arm of the government which is engaged in fighting its battles. Under such circumstances it is not strange that complaints are sometimes made that their judgments do not conform to international law, or that the courts lean unduly towards sustaining a capture made by persons acting in good faith, but in ignorance of all the facts. They certainly can not be expected to have much sympathy for, or to properly appreciate the legal rights of, those who are seeking to take advantage of the misfortunes of their country to carry on an illicit but profitable trade. With a view, then, of obtaining a court which, by its dignity, the number, learning, and impartiality of its judges, should command the confidence, not only of the belligerents and of neutral maritime powers, but of the whole civilized world, the conference adopted the convention for the establishment of an international court.

We are confronted upon the threshold of the convention with the power of the President and the Senate under the Constitution to assent to the creation of a foreign court, with jurisdiction over the courts created by Congress, and even over the Supreme Court of the United States. The appeal is given as a matter of right from the prize court of the belligerent captor, and may be based upon the ground that the judgment was wrong, either in fact or in law. The prize court from which the appeal may be taken is not named, but a further article provides that it may be taken after judgment in the court of first instance, or only after an appeal, as the municipal law of the belligerent captor may decide. To prevent unnecessary delay in the disposition of cases in the national courts, it is provided that but one appeal shall lie from the original judgment, and that, if the national courts shall fail to give final judgment within two years from the date of the capture, the case may be carried directly to the International Court. As, under the laws of Congress, resort may be had to the Supreme Court of the United States, which, though not a foreign court, is a court acting under a different sovereignty, only from the final decree of a State court of last resort, I think we may assume that by analogy Congress would require that parties exhaust their remedies in the local courts before resorting to an appeal to the International Court. This would limit the appeal to the final decrees of the Supreme Court, except in cases where no appeal lies to that court under Revised Statutes, section 695.

But the question still remains as to the power of the Senate, or of Congress, to provide for a review of cases adjudicated in the Supreme Court of the United States — a court created by the Constitution, whose original jurisdiction, at least, is fixed by the same instrument. Congress has provided for an appeal to that court, with certain limitations, from all inferior Federal courts, and, with certain other limitations, from the highest courts of the several States. But no power is given to review a decision of the Supreme Court, and I know of no method by which this can be done. But the power to review given to the International Prize Court implies the power to reverse, and the Supreme Court of the United States, while much given to reversing the decrees of inferior courts, and occasionally even itself, is so little accustomed to being reversed that as a private citizen I would not undertake to say what answer that court would make to an application to transmit its record to the International Bureau, which seems to be a kind of clerk's or registrar's office. I have no doubt the application would be given respectful consideration. One may hope in the interests of humanity that the court may see its way clear to granting it. There is nothing in the Con-at The Hague, and so ably opposed by Captain Mahan, can hardly be said to have become a judicial question, since I know of no maritime power which has granted such immunity to enemy's property, though more than one has professed a willingness to unite with other nations in a convention to that effect. However favorable the proposed court might be to the principle of immunity, it is after all but a judicial body and, like any other court, bound to decide according to the accepted principles of international law, with no further legislative power than every court has to adopt a reasonable construction where the law is unsettled, or the judgments of the national courts are conflicting.

In accordance with this familiar principle, the convention provides, in article 7, that if the question of law to be decided is covered by a treaty between the captor and the neutral power interested the court is governed by the provisions of that treaty; that in the absence of such provisions, the court shall apply the principles of international law; and if no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity. This is analogous to the rulings of our own courts in cases of international collisions, where if both vessels are sailing under the same flag, or under different flags having the same laws, the law of the flag is administered; but if sailing under different flags and different laws, the law of the forum is administered *ex necessitate,* since it would be obviously unfair to prefer the law of one flag to that of the other. These provisions as to the law to be applied also extend to the order and mode of proof. Whether the burden of proof be upon the belligerent captor to establish the regularity of the capture, or upon the neutral to prove its illegality, and in what manner these proofs shall be made, are left to be determined by the local courts, with the proviso that the court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor when it is of opinion that the consequences of complying therewith are unjust and inequitable. If the court pronounces the capture to be valid, the property shall be disposed of in accordance with the law of the belligerent captor. If it pronounces it to be null, the court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damage.

In this connection a possible complication may arise in the insistence of particular nations, before ratification takes place, upon the observance of certain familiar principles of the local law, in cases in which their own vessels are concerned. These would operate as modifications or amendments of the original convention, and if insisted upon by many of the powers might become so numerous as to prove its impracticability, and wreck the whole system. If the local law of the belligerent captor were to be applied in determining the validity of the capture in each instance, nothing would be left to the International Court except the question of compliance with that law in the particular case; when, in fact, the main object of the International Court is not to apply the local law, but the principles of the law of nations, and in the absence of any provisions covering the case the general principles of justice and equity. As this is the first attempt to establish a general international court having jurisdiction not of a particular case agreed upon beforehand, but of all cases of a particular class, its success will be watched with great interest, though it may be many years before a naval war upon a large scale will call its jurisdiction into active exercise. The longer its powers are suffered to remain dormant the better it will be for the peace of the world.

That any system of international courts will ever be devised which will bring about an era of universal peace is probably, to use a phrase current in politics many years ago, an "iridescent dream." The combative instinct is too deeply implanted in the human breast to be repressed by an umpire that has not a physical power strong enough to enforce its decrees against all opposition. Courts of law and the police are able to control this instinct among individuals, but in all bodies of men where each individual is free to speak his mind the *gaudium certaminis,* the desire to stir up strife for its own sake, or to obtain a notoriety for leadership, is often so strong as to subordinate the real business for which the body is assembled and throw it into confusion. This trait is as prominent among nations as among individuals. Large armies are maintained and battleships built as guaranties of peace, but their very existence is provocative of war, and the temptation to use them to demonstrate their efficiency is often stronger than the original intent to employ them only to repel an unjustifiable attack.

There is much force in the suggestion, so often made of late, that the best guaranty of peace is the increasing destructiveness of war. There is probably no branch of human industry in which greater changes have taken place during the past century than in the art of war. The modern ironclad bears no greater resemblance to the ancient frigate than an automobile of to-day to the one-horse "shay" of our great-grandfathers, while the superior range and rapidity of firing of modern rifles and breach-loading guns over the flintlock muskets and smooth-bored cannon of the Napoleonic wars has completely revolutionized the conduct of campaigns and the order of battle. The enormously increased expense of warlike equipments is also an argument making strongly for the preservation of peace. When it is considered that the cost of a first-class battleship is about ten million dollars, and that of maintaining and navigating it nearly one million per year; that the cost of a single coast-defense gun, which will sink a ship at a distance of twelve or fifteen miles, is not less than seventy thousand dollars; that the cost of firing it is about one thousand, and that its life is limited to less than a hundred discharges, when it has to be largely reconstructed, it is evident that there must be a corresponding increase in taxation, or that this country, with all its immense wealth, will find itself outclassed in a naval engagement.

Wars, which were formerly carried on only upon land or sea, are gradually establishing for themselves a new theater of operation in the air. Much of the inventive genius of the past ten years has been expended in devising balloons and flying machines designed for use in time of war; and the nations of Europe, always alert to detect signs of a possible invasion, are watching these new birds of prey with apprehension as to their future development. The fourteenth convention, or rather declaration, of the Hague conference has made a special provision against the launching of projectiles and explosives from balloons and aërial machines.

But it is not alone in equipment that modern warfare has made such remarkable progress. Owing to the assistance received from railways, armies which required months to mobilize and march to the front are now gathered together, despatched by rail in as many days, and hurled against the opposing force in a sharp and decisive series of engagements. In short, a war of thirty years, or even of seven years, is now an impossibility. Defeat, too, is often so much more serious that no time is given for recuperation, and the fate of nations may be decided in the first general battle. Under such circumstances, and with such numerous possibilities, wars are undertaken with great reluctance, and a matter which would have been considered a *casus belli* a century ago is now treated as a proper subject for arbitration. It is safe to say that the beauty of a modern Helen will never be the occasion of another ten years' war. If the progress made in the art of war and the equipment of armies during the last half century be continued for another, it is easy to imagine the result in the total annihilation of one or possibly both of the opposing forces — a contingency which no nation, however belligerent, would care to face, except in a last effort to save its own existence.

Fortunately, the moral progress of the world during the past century contains in itself an assurance that a war will not be undertaken without a substantial cause, and until every effort of diplomacy has been exhausted to avert it. As individuals advance in civilization and refinement, they are less likely to resort to violent methods to redress real or fancied wrongs. As with individuals, so with nations. In the face of much discouragement and disappointment at the result of legislation, which sometimes has a directly contrary effect from that intended, or raises up new evils as serious as those it is designed to suppress, no intelligent man can review the history of the nineteenth century without being convinced of a substantial progress in the tone of political action and public sentiment, and a gradual elevation of the race, which must redound to the general peace of the world.

The slave trade and slavery itself has been abolished; lotteries and public gambling houses suppressed; the rights of women enlarged; the sale of intoxicating liquors largely restricted; the right of suffrage extended even beyond the limits of prudence; the spoils system, which began with the Administration of Jackson and continued with ever-increasing effrontery to the close of Johnson's, finally became abashed at its own audacity, and a reform set in which bids fair to exterminate the whole system and establish the saner policy which prevailed in the earlier days of the Republic. The same tendency is not less manifest abroad. Germany and Italy have been unified, and Japan raised from what, in the schoolbooks of our boyhood, was described as a semi-barbarous people to a civilized and powerful State. The hardships of war have been greatly ameliorated by more humane methods in the care of the wounded, and by the ninth convention of the Hague conference forbidding the bombardment of undefended harbors, villages, towns, or buildings.

The policy of arbitration which seems to have obtained to a very limited extent among Grecian States, and to have been much discussed by publicists during the seventeenth and eighteenth centuries, took definite shape in the nineteenth, and was erected into an international policy by the Geneva Convention. Since then resort has been had to it with increasing frequency, and a permanent tribunal established at The Hague, to which all nations are invited to submit their disputes. It is now proposed to extend their scope by creating a court with compulsory jurisdiction of certain causes arising in time of war. If the convention establishing this court meets with the general acceptance of the powers, and the court should prove equal to the emergencies of the next great naval war, we may reasonably look forward to an extension of the same system to international claims for pecuniary damages, the adjustment of disputed boundary lines, as in the San Juan case, the rights of fishery in territorial waters, the interpretation and application of treaties, the forfeiture of concessions or franchises, and in general to all such *bona fide* controversies as are solvable between individuals in a court of law or equity. As there are among individuals certain personal or family dissensions involving the respective standing or honor of the parties, which can not be settled by the courts, there will probably always arise as between nations certain questions which can only be settled by the arbitrament of the sword. Where there is a predetermination to fight, as in the Franco-Prussian war, a slight pretext is sufficient, and no court can possibly prevent it by peaceful methods.

Our own experience in international arbitrations has been such as to encourage the belief that they will in time supersede the necessity, except in a limited class of cases, of resorting to coercive measures for the redress of international grievances. True, victory has not always perched upon our flag. Nor can this be expected in any form of enforcing a litigious right. But while we may think that in a particular case their conclusion may be erroneous, I have never known a serious charge of incapacity, corruption, or partiality to attach to their action.

Prior to the Civil War most of our disputes were with Great Britain, and concerned the long boundary line between the Bay of Fundy on the Atlantic and the Straits of Georgia on the Pacific Ocean. Some of these were adjusted by commissioners appointed by the two Powers, sometimes with a third commissioner as umpire, and once, at least, by the arbitration of a foreign potentate. The first, decided in 1798, turned upon the identification of the St. Croix River, constituting a part of the boundary line under the original treaty of 1783, and was settled by three commissioners, one appointed by each party, and the third an American chosen by the other two. The line seems to have been fixed by unanimous decision according to the British contention. A further dispute arose in 1817, regarding the islands in the Bay of Passamaquoddy, and was referred to two commissioners, one from each Power, and a compromise judgment rendered.

The northeast boundary between the State of Maine and the British possessions was the subject of two arbitrations, the first of which, submitted to two commissioners — one from each Power — resulted in a disagreement in 1821, and a second covering the same subject was referred to the King of the Netherlands, who made an award which was subsequently waived by both parties and the line established by a new treaty.

Of two arbitrations arising in the settlement of the boundary line through the Great Lakes, one was determined in 1822 by the award of two commissioners, and in the other, the commissioners disagree-ing, the matter was finally adjusted and incorporated into the Ashburton Treaty of 1842.

The northwestern boundary between British Columbia and the present State of Washington was not less fertile of disputes. The line east of the Rocky Mountains had been fixed in 1818 by convention at the forty-ninth parallel of north latitude; but from that time until 1846 the line west of the Rocky Mountains was contested in a series of negotiations which at one time threatened a war between the two countries, but finally, by treaty of 1846, the forty-ninth parallel was extended to the middle of the channel between the continent and Vancouver Island. But certain islands in this channel — notably that of San Juan — still remained in dispute, and were at one time jointly occupied by British and American troops. Finally, by the treaty of 1871, the matter was referred to the Emperor of Germany, as arbitrator, who made an award in favor of the United States.

The Geneva Convention of 1872 was the beginning of a new era in the history of international arbitration. Whether we consider the dignity of the two Powers interested, the gravity of the questions involved, the learning and eminence of the members of the convention, the interest displayed in its deliberations by the great powers of Europe, as well as the ability of counsel upon both sides, we can not avoid the conclusion that this was the greatest judicial tribunal of modern times. The foundation of this convention was laid in the treaty of 1871, whereby by Article I it was agreed that five arbitrators be appointed — two by the Powers interested, one by the King of Italy, one by the President of the Swiss Confederation, and one by the Emperor of Brazil — who should consider the question whether due diligence had been used in preventing the fitting out of Confederate vessels within British jurisdiction, and also of preventing the departure from such jurisdiction of any vessel intended to carry on war against the United States. The decision of this tribunal, holding that due diligence had not been used, and awarding a gross sum of $15,500,000, was a matter of great historical importance. The agreement upon this convention probably averted a war with the mother country.

But we are less concerned with these so-called *Alabama* claims than with the claims of British subjects against the United States, and the counterclaims of citizens of the United States against Great Britain, distinct from the *Alabama* claims. The British claims were of three classes:

1. For injuries inflicted by the Confederacy or its citizens;
2. Claims growing out of captures by United States cruisers;
3. Claims for arbitrary arrests, compulsory military service, and other alleged violations of the personal rights of British subjects.

These claims were, under Articles XII to XVII of the treaty of 1871, referred to three commissioners — one by each Power, and one to be appointed by the President and Her Britannic Majesty acting jointly. Count Corti, the Italian Minister at Washington, was agreed upon as the third commissioner.

Under the provisions of the treaty, four hundred and seventy-eight British and nineteen American claims were laid before the commission. The British claims, with interest, amounted to $96,000,000, and the American claims to less than $1,000,000, all of which latter were rejected. One hundred and eighty-one British claims were allowed, at less than $2,000,000 — a liberal deduction from the original amount claimed.

Many of these claims had been adjudicated by the prize courts of this country, and in a great majority of these cases the ultimate decision of the Supreme Court was sustained by the commissioners, although in three cases, *The Hiawatha* (2 Black 635), *The Circassian* (2 Wall. 135), in both of which there had been a strong dissenting opinion by Mr. Justice Nelson, his view was adopted, and in the third case, *The Sir William Peele* (5 Wall. 517), the commissioners disagreed with the Supreme Court upon a subordinate point.

Many of these controversies with Great Britain turned upon questions of territorial rights, the respective duties of belligerents and neutrals in time of war; and had either country been less conciliatory in its spirit these controversies might have led into an open rupture. As it was, there were several occasions in which it seemed as though war was inevitable. But the good sense of the Anglo-

Saxon race finally asserted its supremacy and saved the two countries, as it undoubtedly will many times in the future, from an armed conflict.

The results, as well as the arguments by which they were reached, confirm the impression that while there is nothing to impugn the good faith or partiality of the local courts, exact justice is more likely to be attained by a court of nine members, most of whom are neutrals, having no interests either of national pride or patriotism to deflect their judgments in favor of one party or the other. Great reforms are usually of slow growth, but if the wish for peace be once conceded the obstacles in the way of securing it will, in the gradual and progressive enlightenment of the race, ultimately disappear. Indeed, a frank recognition of the evils of an existing system is itself a long step towards their amendment.

We shall all welcome the International Prize Court as an important factor in the maintenance of a general peace.

HENRY B. BROWN.

# CONSTITUTIONALITY OF THE PROPOSED INTERNATIONAL PRIZE COURT—CONSIDERED FROM THE STANDPOINT OF THE UNITED STATES

The twelfth convention adopted by the Second International Peace Conference at The Hague provides for the establishment of an International Prize Court, to which appeals may be taken from the national prize courts of the various signatory powers, or such of them as shall approve the convention. The third article of the convention provides:

> The judgments of national prize courts may be brought before the International Prize Court —
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> 1. When the judgment of the national prize court affects the property of a neutral power or individual;
> 2. When the judgment affects enemy property and relates to —
>     (*a*) Cargo on board a neutral ship;
>     (*b*) An enemy ship captured in the territorial waters of a neutral power, when that power has not made the capture the subject of a diplomatic claim;
>     (*c*) A claim based upon the allegation that the seizure has been effected in violation either of the provisions of a convention in force between the belligerent powers or of an enactment issued by the belligerent captor.
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> The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

As indicated by the article quoted, the validity of the seizure of the prize is determined in the first instance by the courts of the belligerent captor, from which an appeal lies, in the cases mentioned, to the International Prize Court at The Hague.

If the convention establishing this court is ratified by the Senate of the United States, and legislation supplemental thereto is enacted by Congress, we shall have a condition which is a novelty in our system of jurisprudence. Cases originating in the courts of the United States will be capable of removal by appeal to a court located on foreign soil, not forming a part of our judiciary system, and not subject to the control or supervision of the United States Government or any Department thereof. The provision for such appeals, either directly from the district courts or after appeal to the Supreme Court, will doubtless include certification of the record, preserving the *status quo* of property involved pending the appeal, and submission to the decision when rendered, even though it may reverse the Supreme Court of the United States.

It was stated in the report of the delegates of the United States to the Second International Peace Conference that "the question of the constitutionality of the proposed International Court of Prize as a treaty court would seem to be precluded by the decision of the Supreme Court of the United States. *In re* Ross (140 U. S., 453)."[1] That case, however, while upholding the power of the United States to provide by treaty a consular court in a foreign country, is by no means authority for the proposition that it may by treaty or act of Congress confer upon a foreign tribunal appellate jurisdiction of cases originating in courts of its own country.

Whether the power exists to provide for appeals to the proposed court depends upon two questions:

(1) Whether the grant of the treaty-making power to the President and the Senate includes the power to provide for the judicial settlement of questions of an international nature.

(2) Whether this power is limited by the grant of the judicial power of the United States to the Federal courts, so as to exclude the power to provide by treaty for the appeal to an international tribunal of prize cases originating in our own courts.

The Constitution provides (Article II, section 2):

> He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.

Laying aside for the moment the question as to any limitation implied by the constitutional grant to the Federal judiciary, the power of the United States to provide by treaty for the establishment of international courts and the adjustment of international differences therein is free from doubt.

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[1] Senate Doc. No. 444, page 49.

Whatever may have been supposed at one time, there is no longer any doubt that the people of the United States, by the adoption of the Constitution, founded a nation which in its relations with other countries of the earth has the attributes and powers of any other nation, unless limited by some express or necessarily implied restriction contained in the Constitution. Among such powers is that of making treaties. The people of the United States, in creating the Federal Government, did not withhold to themselves or vest in the States any part of the treaty-making power; it was all vested in general terms in the Federal Government. That Government, therefore, has *prima facie* all the power which the people of the United States themselves had, or could have, to negotiate with foreign governments or to enter into treaties or agreements of an international character. Whatever limitations of the treaty power may be implied from our fundamental system, by which many of the functions of government are distributed between the States and the nation, there is no doubt that in its strictly international relations the power of the Federal Government in this regard is unlimited unless restricted by some other clause of the Constitution.

In the case of Geofroy v. Riggs, 133 U. S., 258 (1889), it was said:

> That the treaty power of the United States extends to all proper subjects of negotiations between our Government and the governments of other nations, is clear. * * * The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its Departments, and those arising from the nature of the Government itself, and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government, or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Among such questions there are none which are more proper or necessary for negotiation with foreign countries than those relating to the adjustment of differences of an international character arising between the United States and foreign nations or individuals. There is not, and never has been, any doubt that the United States can by treaty provide for the arbitration or decision by specially constituted courts of cases involving questions of this nature, and that the decision of such courts is as conclusive as any other decree.

In Comegys v. Vasse, 1 Peters, 193, Mr. Justice Story, referring to the treaty of May 22, 1819, between the United States and Spain, said:

> The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reexaminable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim can not be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury.[2]

The universal practice of all Departments of the Federal Government, from the foundation of the nation until now, has been in conformity with this construction, as is evidenced by the long series of international disputes which have been submitted by treaty to mixed commissions or courts agreed upon by the contracting powers, and whose decisions have been accepted and scrupulously performed.

No reason is perceived why, *prima facie,* a general agreement may not be made with other nations, providing for the submission of questions of a similar nature to a permanent tribunal, either as a court of first instance or after a preliminary trial in the courts of the various nations. That the United States has the same power as any other nation of the world to establish treaty courts in other countries for the adjudication of cases involving the rights of her own citizens has been already decided. (*In re* Ross, 140 U. S., 453.) From a consideration only of the grant of the treaty-making power, therefore, it would seem clear that unless restricted by some other clause of the Constitution, the Federal Government has the power to provide for the judicial decision by international courts of any question of an international nature, either in the first instance or after a preliminary trial in the courts of its own country.

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[2] Other cases to the same effect are *The La Ninfa,* 15 Fed. Rep., 513; Sheppard v. Taylor, 5 Peters, 675; Frelinghuysen v. Key, 110 U. S., 63; Boynton v. Blaine, 139 U. S., 306; La Abra Silver Mining Co. v. United States, 175 U. S., 423.

The second and more difficult question is whether the grant of the judicial power of the United States to the Supreme Court and such inferior courts as Congress may from time to time establish is a limitation of the power of the Federal Government to provide by treaty for the judicial settlement of questions of an international nature, and particularly whether it is a denial of the power to provide for the appeal of prize cases to the proposed court at The Hague.

The Constitution of the United States provides, Article III, section 1:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

Article III, section 2:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; * * * to all cases of admiralty and maritime jurisdiction * * *.

Article I, section 8:

> The Congress shall have power * * * to constitute tribunals inferior to the Supreme Court * * *.

It is argued from these provisions that the judicial power of the United States is exclusively vested in the Supreme Court and such inferior courts as Congress may from time to time establish, and that the Federal Government can not by treaty or act of Congress provide for the exercise of judicial power by a court located in a foreign country, not constituted by the Congress of the United States, and superior in authority to the Supreme Court of this nation.[3]

It will be perceived that the whole of the argument, as applied to

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[3] This view is supported somewhat by the dictum of Justice Story in Martin v. Hunter's Lessee, 1 Wheaton, 330, where he says:

"Congress can not vest any portion of the judicial power of the United States the case before us, is that the words "judicial power of the United States" include all judicial power which can be exercised in prize cases originating in the courts of the United States so as to preclude the exercise of judicial power in such cases by an international tribunal.

That this argument is based upon a misapprehension will appear from the following propositions:

1. The judicial power of the United States, while it comprehends them in the first instance, does not extend to the final adjudication of the rights of foreign nations or individuals which are necessarily involved in prize cases.

The phrase "judicial power of the United States" must be construed in the light of the rules of international law generally accepted now and at the time these words were written into the Constitution. The jurisdiction over questions of prize is by the rules of international law in the courts of the belligerent captor. But the judicial power of the belligerent captor does not extend to a final decision of the cause. The adjudication by its courts may be effective to pass title to property involved, but as between the captor and neutral powers or individuals it is no more than an expression of opinion that the seizure was regular and justifiable, and a declaration that it is adopted by the captor nation as its act. Where the rights of foreign citizens or subjects are adjudicated by municipal courts in ordinary cases the decision is accepted as conclusive because the court, by the voluntary act of the alien, has acquired jurisdiction of the person or the subject-matter. But when a prize is captured upon the high seas, it is taken by force and against its will before a

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except in courts ordained and established by itself. * * * It would seem, therefore, to follow that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court can not take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority."

This dictum was mentioned with approval in Robertson v. Baldwin, 165 U. S., 275, 278, Brown, J.

hostile court where the examination is conducted as to the validity of the capture. Under these circumstances it is not only just and equitable, but well settled by the rules of international law, that the decision of such court is not conclusive of the rights of any foreign nation or individual. The action of the judicial department of a nation in this regard is no more final than is that of the executive department in a similar case; in each instance the matter becomes a subject for international adjudication.

This question as to the conclusiveness of a judicial decree by a court of the captor was elaborately considered in the case of the *Betsy*, which was decided by a mixed commission, appointed by the United States and Great Britain, under Article VII of the treaty of November 19, 1794 (Moore, Inter. Arb., 3160). It was the opinion of one commissioner that the sentence of condemnation having been affirmed upon appeal to the supreme tribunal of the belligerent captor, the Lords Commissioners of Appeals of Great Britain, the commission should be bound by that decision. This view of the case was repudiated by all other members of the commission, both British and American. They held upon abundant authority that the commission had jurisdiction to reconsider the whole case and to reverse the decision of the supreme tribunal of the belligerent captor if in their judgment it was not in accordance with the facts and the law. Mr. Pinckney, one of the commissioners, said in his opinion (Moore, Inter. Arb., p. 3186):

> If admiralty decrees are to carry along with them incontrovertible evidence of their own legality — if they are to be sheltered by a veil of imaginary sanctity from all scrutiny or examination into their merits, and if they are to pass upon the world for just, although palpably oppressive, it is in vain that the law of nations has circumscribed prize cognizance and laid down rules of conduct to those to whom it is committed. No sophistry can establish this position that although a flagrant wrong has been done by one nation to another, under the pretext of the law of nations, that very law prohibits retribution, or that an injurious act becomes to all effectual purposes a lawful one for no other reason but because it has been done.

The final decision by the courts of the captor is deemed to be a denial of justice if thought erroneous by the foreigners whose rights are involved, and the case at once becomes a subject for diplomatic correspondence or international adjudication.

> But the moment the decision of the tribunal of the last resort has been pronounced [says Wheaton, para. 392, 4th ed.] (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts) and justice has been thus finally denied, the capture and the condemnation become the act of the state, for which the sovereign is responsible to the government of the claimant.

This principle of international law, that the judicial power of the belligerent captor does not comprehend a final decision of international questions arising in prize cases, has been fully recognized and acted upon many times by the Government of the United States in that many cases of prize decided by our Supreme Court have been thereafter submitted to international commissions which have reviewed the judgment of that court and in a number of instances have determined it to be erroneous. These decisions have been uniformly submitted to by all Departments of the United States Government and money paid or property delivered in accordance with their terms.

In the case of the *Hiawatha* (Moore, Inter. Arb., p. 3902) the Supreme Court of the United States had affirmed the judgment of the lower court (2 Black., 635) in condemning the vessel and cargo as a prize, on the ground that at the time of her capture she was attempting to break the blockade established by the United States vessels in Hampton Roads. The question was subsequently submitted to the claims commission established under article 12 of the Treaty of Washington, May 8, 1871, between Great Britain and the United States. The commission awarded damages to the claimants of the vessel and of a portion of the cargo, apparently on the ground that the Supreme Court of the United States was in error in finding that the vessel was attempting to violate the blockade, or that any legal blockade existed at the time of the capture.

In the case of the *Circassian* (Moore, Inter. Arb., p. 3911) the vessel was condemned as a prize and the decision affirmed by the Supreme Court of the United States (2 Wall., 135). The case having subsequently been submitted to the same commission, large awards were made in favor of the claimants. The judgment of the

Supreme Court of the United States that the *Circassian* was guilty of attempting to run the blockade was held to be erroneous. The English, American, and continental view of what constituted violating a blockade was much considered in the argument of this case, and the decision in part no doubt was based upon the belief that the Supreme Court of the United States was in error in its construction of the law.

In the case of the *Springbok* (Moore, Inter. Arb., p. 3928), the vessel having been awarded to the claimants by the Supreme Court of the United States, and the cargo condemned (5 Wall., 1), the commission, disregarding the judgment of the Supreme Court in this respect, awarded the claimants damages for the detention of the vessel.

In the cases of the *Sir William Peel,* the *Dashing Wave,* the *Volant,* and the *Science* (Moore, Inter. Arb., pp. 3935, 3948, 3950), the question involved was whether the vessels were in neutral waters at the time they were captured. The decision of the Supreme Court of the United States with regard to the *Sir William Peel* (5 Wall., 517); the *Volant* (5 Wall., 179), and the *Science* (5 Wall., 178) were reversed in part, and damages awarded to the complainants. In the case of the *Dashing Wave* (5 Wall., 170) the judgment was affirmed.

While it may be incorrect to say that these cases were actually reversed in the sense in which we use the word in connection with ordinary cases of appeal, yet the fact remains that the decisions of the Supreme Court of the United States were reviewed at length by the commission, and that contrary conclusions were reached. For all practical purposes these were reversals, and the awards in each case were accepted by the United States and their terms carried out.

There are a number of other cases considered by commissions in which the decisions of the Supreme Court of the United States were determined to have been correct.[4]

[4] Among these may be mentioned: *The Peterhof,* 5 Wall., 28; 4 Moore, Inter. Arb., 3838–3843; *The Georgia,* 7 Wall., 32; 4 Moore, Inter. Arb., 3957–58; *Isabella Thompson,* 3 Wall., 155; 4 Moore, Inter. Arb., 3159; *The Pearl,* 5 Wall., 574; 4 Moore, Inter. Arb., 3159; *The Adela,* 6 Wall., 266; 4 Moore, Inter. Arb., 3159; *The Ouachita Cotton,* 6 Wall., 521; 3 Moore, Inter. Arb., 3232.

This universal practice, concurred in by all Departments of Government, is strongly corroborative of the view expressed that the judicial power of our courts should not be construed to extend to the final settlement of such questions.

I conclude that under the generally accepted rules of international law existing at the date of the adoption of the Constitution the grant of the judicial power of the United States does not include the power to decide finally the rights of foreigners involved in prize cases. The clause which vested the judicial power in the Federal courts is not, therefore, a denial of the power to provide by treaty for the ultimate decision of such questions by international tribunals.

2. The grant of the judicial power of the United States to the Federal judiciary does not limit the power to provide by treaty for the judicial decision of questions of an international nature.

It may be thought unnecessary and, perhaps, unwise to consider a broad proposition, such as this, in view of the fact that the conclusion already reached is sufficient to decide the question now under discussion. It can not fail, however, to add strength to the argument if it should on investigation develop that the power of the Federal Government to provide by treaty for the judicial decision of questions of an international nature is in no case limited by the grant of judicial power to the Federal judiciary.

The proposition above stated recognizes that there is a judicial power which is international and may be exercised by one nation only in cooperation with others. This power comprehends questions of an international character, and is exercised through the medium of international commissions or courts designated or erected by treaty. The judicial power of the United States or of any nation extends to a final adjudication of all cases involving only questions of municipal law in which the decisions of its courts are not reexaminable by any international court or commission; it does not, however, extend to a final decision of questions which are international in character. There is no doubt that the courts of the United States may for convenience examine such questions when they arise in cases properly brought before them, always subject, however, to the power of the Federal Government to provide by treaty for their decision by other tribunals. In other words, there is a class of cases which are purely municipal and are exclusively within the scope of the judicial power of the United States; there is a second class of cases which are purely international and are entirely without the judicial power of the United States, and within that exercisable only in pursuance of treaties; and there is a third class, which, while cognizable by national courts, also give rise to questions the decision of which may involve us in international difficulties. In the latter class the power of the Federal courts to decide such questions is likely to be taken away through the exercise of the treaty power, whenever it is deemed expedient by the Federal Government. The relation between the treaty-making power in this regard and the national judiciary is not unlike that existing between Congress and the State legislatures in those matters over which they have concurrent jurisdiction; Congress may decide how much, if any, of this common ground may be occupied by the State legislation. So in the matter of the judicial decision of questions of an international nature, the Federal judiciary may decide them when they arise in cases properly before them, yet when the treaty-making power steps in and provides another method that method takes precedence.

The judicial decisions of the highest courts of the United States and the practice of the Government from the foundation of the nation demonstrate the truth of what has been said. There is no doubt that the judicial power of the United States comprehends the decision of all cases arising within its territorial jurisdiction, even though both litigants may be citizens of a foreign country and questions likely to give rise to diplomatic correspondence are involved. It is equally undoubted, however, that the United States may by treaty disturb the exercise of such jurisdiction or destroy it altogether, by providing for the trial of such cases in consular courts erected by treaty. By many treaties now existing claims for wages between the crew of a vessel and the master or owner thereof, and other similar questions, are to be tried in consular courts, and not by the courts of the country where the vessel happens to be. In the

*Elwine Kreplin*, 9 Blatch., C. C., 438, it was held by a United States circuit court that it had no jurisdiction of a dispute of this kind over wages; that the jurisdiction of a consular court erected by treaty was exclusive of that of the Federal courts. On application to the Supreme Court for a mandamus to compel the circuit court to take jurisdiction (*Ex parte* Newman, 14 Wall., 151) it was argued that the treaty, if properly so construed, was unconstitutional because —

> It strips the courts of the United States of the admiralty jurisdiction conferred on them by the Constitution of the United States.

Nevertheless, the mandamus was denied, the Supreme Court apparently approving the decision of the lower court in its entirety, and certainly doing so to the extent of holding that the consular court had jurisdiction and the circuit court had discretion whether or not to take jurisdiction. The correctness of this ruling that such courts may lawfully adjudicate cases involving questions affecting foreign nations or individuals is not open to doubt.[5]

The case of *In re* Ross, 140 U. S., 453, mentioned in the report of the delegates to the Second International Peace Conference at The Hague, while not authority for the proposition that the proposed International Prize Court is constitutional, fully upholds the power of the United States to create a consular court in a foreign country and to provide for the trial therein of cases which under other circumstances might be tried by the courts of the United States. In the decision of that case Mr. Justice Field said:

> The treaty-making power vested in our Government extends to all proper subjects of negotiation with foreign governments. It can equally, with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

This language makes it clear that the power to establish consular courts at least is not restrained by the grant of the judicial power to the courts of the United States.

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[5] *The Belgenland*, 114 U. S., 355, 364; *The Bound Brook*, 146 Fed. Rep., 160; *The Salomoni*, 29 Fed. Rep., 534; Tellefsen v. Fee, 168 Mass., 188; Norberg v. Hillgrau, 5 N. Y. Leg. Obs., 177.

In the very matter of prizes which we are now considering, the practice of the United States Government strongly tends to uphold its power by treaty to provide for the adjudication of prize cases. We have already seen that the final settlement of such cases has been undertaken many times in the past by special commissions, and no good reason is observed why that may not be done by a permanent court which previously has been done by special temporary courts in particular cases. Furthermore, an examination of the treaties which have been concluded in the past, and the correspondence undertaken in connection therewith, shows that the treaty-making power has been considered from a very early period to comprehend the power to provide special tribunals for the adjudication of prize cases, even in the first instance. For example, in 1789 the United States ministers, Charles C. Pinckney, John Marshall, and Elbridge Gerry, in a communication to the Minister for Foreign Affairs of the French Republic, said:

> Another doctrine advanced by Mr. Genet is, that our courts can take no cognizance of questions, whether vessels, held by them as prizes, are lawful prizes or not; that this jurisdiction belongs exclusively to their consulates here, which have been lately erected by the national assembly into complete courts of admiralty.
>
> Let us consider, first, what is the extent of the jurisdiction which the consulates of France may rightfully exercise here. Every nation has, of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies. If it cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend upon the instrument of cession. The United States and France have, by their consular convention, given mutually to their consuls jurisdiction in certain cases especially enumerated. But that convention gives to neither the power of establishing complete courts of admiralty, within the territory of the other, nor even of deciding the particular question of prize or not prize. The consulates of France then can not take judicial cognizance of those questions here.[6]

This language is of importance because, being a discussion whether the treaty with France had conferred upon her consular courts in this country full authority in admiralty cases involving French prizes, it contains not a hint of any lack of power in the United States by treaty to make such provision.

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[6] State Papers and Publick Documents of the United States, vol. 4, p. 106.

In the long discussion which took place at that period, between the United States and France, there are many such expressions by the representatives of the United States, and so far as I am aware never a suggestion of a lack of power to make any provision with regard to the adjudication of prizes upon which the two nations might agree. The treaty with France then negotiated and many other treaties which have been concluded since[7] have contained a clause providing:

> It is further agreed that in all cases the established courts for prize causes in the country to which the prize may be conducted shall alone take cognizance of them.

Halleck (vol. 2, page 427, sec. 5) interprets this clause as conferring authority upon the courts of neutral nations to adjudicate upon prize cases which may happen to be conducted to them. While this interpretation is not believed to be warranted by the contemporary history of the clause,[8] which first appeared in the treaty with France of 1880, the very fact of its enactment is nevertheless clear evidence that the Federal Government has considered itself competent to deal with the question of the establishment or designation of prize courts by treaty.

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[7] Among other treaties may be mentioned those with Colombia, October 3, 1824, art. 21; Central America, December 5, 1825, art. 28; Brazil, December 12, 1828, art. 28; Chile, May 16, 1832, art. 21; Peru-Bolivia, November 30, 1836, art. 20; Ecuador, June 13, 1839, art. 24; Bolivia, May 13, 1858, art. 24; Colombia, December 12, 1846, art 24; Haiti, November 3, 1864, art. 28; Peru, August 31, 1887, art. 25.

[8] The contemporary history of this clause shows, I think, that it was intended merely to prevent irregular condemnation of prizes by other than established courts, as had previously been the practice of the French nation. In the instructions issued to the American commissioners by the Secretary of State occur the following paragraphs which make it clear that such was their purpose. In paragraph 22 it is said:

"Prizes ought to be conducted to the country to which the captors belong, unless the two parties are engaged in hostilities against a common enemy. But in this case the established courts for prize causes in the country to which the prizes are conducted should alone take cognizance of them." Annals of Congress, 6th Congress, 1799–1801, Col. 1118.

In paragraph 27 of his instructions, the Secretary said:

"But a still greater evil remains, and more difficult to remedy — the improper

It thus appears both by the decisions of our courts and the practice of our Government that courts may be erected or designated by treaty with jurisdiction of cases previously cognizable by the courts of the United States.

I conclude that the grant of the judicial power of the United

institution of prize courts. Probably no provision can be explicitly made, other than that each party will take effectual care that the judgments and decrees in prize causes shall be given conformably to the rules of justice and equity, and the stipulations of the treaty, and without any unnecessary delay, by judges above all suspicion, and who have no manner of interest in the cause in dispute. It would be some check on the judges in prize causes if their reasons for condemning were required to be stated, with the other proceedings, in writing; and copies of the whole should, if demanded, be delivered to the commander or agent of the captured vessel without the smallest delay, or, at furthest, within fifteen days after sentence pronounced, and sooner if practicable, and at the expense of the captors (in case of condemnation), not of the captured, who are otherwise sufficiently distressed.

"Prizes, as already observed, should be conducted into the ports of the party at war, or of an associate in the war, and there adjudicated by the regular tribunals. The French have conducted their prizes into neutral as well as belligerent ports; and, when there was no consul to try and condemn, leaving there the prizes, they have carried the papers to a distant place to find a French tribunal; and there, in the absence of the captured party, procured sentences of condemnation, and sold the prizes. The same mode of obtaining condemnation has been uniformly practiced when they carried their prizes into the ports of an associate in the present war. But, without waiting for the result of this farcical trial, it has been common to unlade and sell the cargoes as soon as they reached a port." Annals of Congress, 6th Congress, 1799–1801, Col. 1120.

In the preliminary draft of the treaty which was submitted by the American commissioners the language of Article XXVIII, which subsequently became Article XXII of the treaty, was as follows: "It is further agreed that all prizes shall be conducted to a port of the party at war; and in all cases the established courts for prize causes in the country to which the prizes may be conducted shall alone take cognizance of them." Col. 1160.

A careful search of available documents with regard to the negotiotion of this treaty has failed to show why the language was changed to read in Article XXII as follows: "It is further agreed that in all cases the established courts for prize causes of the country to which the prize shall be conducted shall alone take cognizance of them." I think, however, that it is fair to assume the reason for this change was an apparent admission by both parties that where there were allies engaged in war the prize might be conducted into the courts of either and the adjudication there had. It is probable that the words omitted were stricken out for the purpose of permitting the conduct of prizes to the courts of the ally, as well as of the captor, and that there was no intention to provide for the adjudication of prize cases in the courts of neutrals.

States to the national courts does not limit the power of the Federal Government to provide by treaty for the decision of any question of an international nature. Being not so limited the United States may by treaty provide for the adjudication of prize cases in any manner it may deem expedient, either in an international court of first instance or after a primary decision in its own courts.[9]

It may, perhaps, be thought a startling doctrine that the Federal Government may by treaty establish courts to exercise a portion of the jurisdiction vested by the Constitution in the national judiciary. But this power will necessarily be limited to cases involving questions of an international nature, such as those now under discussion. In matters concerning only questions of municipal law there can be no such interference.

Even if it were not abundantly upheld by authority, the power of the United States to provide by treaty for the judicial determination of all cases of an international character could be upheld on the ground of necessity and from the nature of the thing. The people, in whom was vested all governmental power, committed to the legislative and executive authorities the great powers to declare war, make peace, and conclude treaties. The management of foreign relations was in general and unlimited terms committed into their hands. What could be more intimately connected with these functions or more necessary to their exercise than the power to provide for the judicial decision of questions likely to involve us in international difficulties; and what more unlikely than an intention to limit powers necessary for the preservation of our national existence, by any grant to a department of government destined to operate exclusively upon the inhabitants of the United States or others who voluntarily bring themselves within its authority. It is a very reasonable assumption that our fathers intended the grant of judicial power to be exercised within the limits of the United States to be subject to the great and unlimited power of making treaties which was to regulate our relations with all the peoples of the earth.

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[9] A suggestion has been made that questions which are ultimately to be decided by commissions or courts established by treaty are not judicial questions, and will not be taken cognizance of by courts of the United States; and that in the event of a provision for appeals from district courts or from the Supreme Court of the United States to the International Prize Court at The Hague, the courts of the United States will decline to take jurisdiction of prize cases in the first instance. It is not perceived that this argument has any substantial merit. As we have seen, the decision of such cases in so far as they involve the rights of foreign nations or individuals have never been final, but have always been subject to reversal by a temporary international court or commission. This has not hitherto interfered with the assumption of jurisdiction by the lower courts and no reason is perceived why it should do so in future. Furthermore, a mere provision by treaty for the final solution of such questions in a regular permanent manner would in no wise change the essential nature of the questions involved; as they have been judicial heretofore, they will continue to be judicial hereafter.

Thos. Raeburn White.

# THE HAGUE CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR[1]

The purpose of this convention, as indicated in the preamble, is to harmonize the existing divergent views of states concerning the relations between neutrals and belligerents in the event of naval war, and to anticipate the difficulties to which such divergence may give rise, by framing rules of general application to meet the case where hostilities may have unfortunately broken out.[2]

The advantages of an international agreement accomplishing such a purpose must be apparent. The benefit derived from the fact of codification may in itself, in the estimation of some foreign offices, afford ample reason for the approval of rules of conduct not heretofore believed to be sanctioned by general consent.

The great problem confronting the committee which prepared the convention was to reconcile the right of the neutral to afford asylum with its duty to abstain from participation.[3]

The first four articles of the convention relate to the inviolability of neutral territory. Article 1 declares:

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[1] The text of this convention, with an appended English translation, is contained in the AMERICAN JOURNAL OF INTERNATIONAL LAW, Supplement, II, 202.

[2] The report of the *comité d'examen* declares: "La chose essentielle, c'est que tous sachent à quoi s'en tenir et qu'il n'y ait pas de surprise." (Report to the Conference, 3.)

[3] The convention was the work of a *comité d'examen*, by whom it was presented to the Third Commission and was, after amendment, reported by that commission to the conference. The *comité d'examen* was composed of the following members:

President, Count Tornielli (Italy); reporter, Mr. Renault (France); Rear-Admiral Siegel (Germany); Rear-Admiral Sperry (United States); Commander Burlamaqui (Brazil); Mr. Lou Tseng-Tsiang (China); Mr. Vedel (Denmark); Captain Chacon (Spain); Sir E. Satow (Great Britain); Captain Castiglia (Italy); Mr. Tsudsuki (Japan); Mr. Hagerup (Norway); Lieutenant-Commander Ferraz (Portugal); Mr. Tcharykow (Russia); Mr. de Hammerskjöld (Sweden); and Turkhan Pasha (Turkey).

> Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality.

Article 2 declares:

> Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war ships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.

These provisions arouse inquiry, first, as to the nature and extent of the duty of the belligerent to respect neutral territory; secondly, concerning the duty of the neutral to prevent violations of neutrality.

That neutral territory should not be the scene of naval hostilities is generally appreciated. The principle of the inviolability of the territory of a state is not, however, due to the existence of a condition of war between other powers, or to the neutral character of the state itself. Each nation, by reason of its political independence, has the right to insist that no act in derogation of its sovereignty be committed within its territory or territorial waters.[4] An act of war there perpetrated by the naval vessel of a friendly state is as offensive to the local sovereign as the commission of a common crime.

It is to be observed also that the duty of the belligerent to respect neutral territory is not measured by the neutral's duty of prevention. There may be places within the territorial waters of the neutral where a naval engagement would be offensive to the local sovereign, and where the latter, by reason of its lack of knowledge or power, might be under no obligation to either belligerent to prevent the conflict.[5]

It is essential that within neutral waters every belligerent act be forbidden, the commission of which, if tolerated by the neutral, would constitute a breach of neutrality on its part. This is accomplished by article 1.

The prohibition expressed in article 2 is comprehensive and emphatic. Inquiry is made whether the prohibition is intended to cover every possible situation. Although a belligerent can not be said to possess the right to commit warlike acts in neutral waters, it is not true that all such acts are, on principle, unjustifiable. The commission of an act of hostility on grounds of self-defense is not a wrong to the neutral. It is unnecessary to elaborate circumstances warranting such conduct. It may be observed, however, that the belligerent war ship which fires the first shot at the enemy is not necessarily taking the initiative, or beginning hostilities.[6]

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[4] Report to the Conference, 3 and 4.

[5] *Id.*, 3–4.

Article 3 declares:

> When a ship has been captured in the territorial waters of a neutral power, this power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize, with its officers and crew, and to intern the prize crew.
>
> If the prize is not in the jurisdiction of the neutral power, the captor government, on the demand of that power, must liberate the prize, with its officers and crew.

When the neutral has faithfully employed the means at its disposal either to prevent the commission of the hostile act or to undo the wrong which may have been done, its duty is fulfilled. The practice of nations indicates clearly that the neutral is not the guarantor of the safety of belligerent vessels within the territorial waters of the former.[7]

It is obviously just that provision should be made imposing on the captor government the duty to liberate a prize with its officers and crew wrongfully taken in neutral waters.

Article 4 declares that —

> A prize court can not be set up by a belligerent on neutral territory or on a vessel in neutral waters.

The reporter points out the fact that this article simply embodies what has long been the law of nations. It was accepted without dispute.[8]

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[6] See Lawrence, Inter. Law, 541; Hershey, Inter. Law and Diplomacy of the Russo-Japanese War, 262, note. Compare award of the arbitrator in the case of the Brig *General Armstrong*, Moore, Inter. Arbitrations, II, 1092; see also Hall, Inter. Law, 5th ed., 624.

[7] See Moore, Inter. Law Dig., VII, 1092, 1095, 1101.

[8] Report to the Conference, 6.

Article 5 declares:

> Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

Propositions formulated by Great Britain, Japan, and Russia all opposed the idea that neutral territory should serve as a base of belligerent operations.[9] While that principle was generally appreciated, its application to certain situations was found difficult. The prohibition of the erection of wireless telegraphy stations for the purpose indicated was appropriate and necessary in view of the uses made of that method of communication during the war between Russia and Japan.[10]

Article 6 declares:

> The supply, in any manner, directly or indirectly, by a neutral power to a belligerent power, of war ships, ammunition, or war material of any kind whatever is forbidden.

The principle here expressed meets with general acceptation. Supply by a neutral government of what is forbidden in article 6 would constitute participation in the conflict. Impartial participation is not to be tolerated.[11]

As Walker declares:

> Neutrality does not consist in the mere impartial treatment of opposing belligerents, but in the entire abstinence from any assistance of either party in his warfare.[12]

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[9] *Id.*, 6.

[10] See Hershey, Inter. Law of the Russo-Japanese War, 115–119, 121–125; report of M. Fauchille to the Institute of International Law, 1906, Annuaire, XXI, 76.

[11] But see Report of Mr. Carpenter, Senate Committee on the Sale of Arms by the Ordnance Department, May 11, 1872, with reference to the right of the United States to sell to the French Government munitions of war during the Franco-Prussian war. S. Rep. 183, 42d Cong., 2d sess. Moore, Inter. Law. Dig., VII, 973–974. Compare Hall, Inter. Law, 5th ed., 598. See also Mr. Day, Secretary of State, to Mr. Hay, ambassador to Great Britain, telegram, June 25, 1898, MS. Inst. Great Britain, XXXII, 680; Mr. Moore, Acting Secretary of State, to Mr. Hay, telegram, June 26, 1898, *id.*, 683; Moore, Inter. Law Dig., VII, 868.

[12] Science of Inter. Law, 374.

The question suggests itself whether the prohibitions of article 6 are intended to cover the case where a neutral government consents to the sale, by its own citizens, of a merchant vessel subsidized by such government for its own service in time of war, and where the real purchaser is a belligerent, which, upon receipt of the vessel, commissions it as a cruiser. If the merchant vessel, by reason of the provisions of a subsidy contract, may be said to belong to the auxiliary or reserve naval force of the neutral, the permission of, or consent to, the sale by such state may be reasonably regarded as an act by the neutral power itself.[13]

Article 7 declares:

> A neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to an army or fleet.

These provisions aroused no discussion and received barest comment at The Hague. That fact illustrates well the general acquiescence in the existing practice of maritime nations which imposes no obligation on the neutral to prevent a traffic which can not, nevertheless, be regarded as lawful. The supply of what may be of use to a fleet or an army is wrongful because it is a direct aid to the belligerent, and thus constitutes participation in the conflict.[14]

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[13] See T. E. Holland, "Neutral Duties in Maritime War," Proceedings of the British Academy, II, 2, translated and published in Rev. D. Inter. P. Lég. Comp., 2d series, VII, 359. See also Oppenheim, II, 344; Hershey, Inter. Law and Diplomacy of the Russo-Japanese War, 91–93, 110.

[14] On the wrongfulness of such traffic Professor Moore, in the course of an instructive commentary, says in part:

"The acts which individuals are forbidden to commit and the acts which neutral governments are obliged to prevent are by no means the same; precisely as the acts which the neutral government is obliged to prevent and the acts which it is forbidden to commit are by no means the same. The supply of materials of war, such as arms and ammunition, to either party to an armed conflict, although neutral governments are not obliged to prevent it, constitutes on the part of the individuals who engage in it a participation in hostilities, and as such is confessedly an unneutral act. Should the government of the individual itself supply such articles it would clearly depart from its position of neutrality. The private citizen undertakes the business at his own risk, and against this

That restraint of the participant is the privilege of the belligerent rather than the duty of the neutral is a principle so widely accepted at the present time that its formal recognition in article 7 is not surprising.

Article 8 declares:

> A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war.

That this article should without difficulty have been agreed upon by a committee of experts in 1907, representing the leading maritime powers, proves the truth of M. Rivier's statement that no nation would to-day dream of contesting the principles laid down in the Neutrality Rules of the Treaty of Washington of May 8, 1871.[15]

It was not the character of the act to be prevented, but rather the measure of exertion which the neutral ought to employ to prevent the fitting out or arming of vessels within its jurisdiction, which provoked the divergent views of the United States and Great Britain

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risk his government can not assure him protection without making itself a party to his unneutral act." (Inter. Law Dig., VII, 748–752, citing Heffter, Bergson's ed. by Geffcken (1883), 384; Kent, Inter. Law, 2d ed., by Abdy, 330; Woolsey, Inter. Law, secs. 193, 194; Manning, Law of Nations, Amos's ed., 352; Creasy, First Platform of Inter. Law, 604; Holland, Studies in Inter. Law, 124–125; Baker's First Steps in Inter. Law, 281; Washington's Neutrality Proclamation of April 22, 1793, Am. State Papers, For. Rel., I, 140; President Grant's Neutrality Proclamation, Aug. 22, 1870, Wharton's Inter. Law Dig., III, 607–608; Brazilian circular, April 29, 1898, Proclamations and Decrees during the War with Spain; Great Britain's Proclamation of April 23, 1898; British Proclamations, 31, 35.) See also "Observations on the Law of Contraband of War, by Hon. Charles B. Elliott, 24th report, Proceedings of International Law Association, 1907, 118, 135–138.

[15] Rivier, Principes du Droit des Gens, II, 408, cited in Moore, Inter. Law Dig., VII, 1070, note d. For text of the Washington Rules, see Moore, Inter. Law Dig., VII, 1059.

before the Geneva Tribunal.[16] The "due diligence" which the Washington Rules declared the neutral was bound to exercise was a vague description of the measure of exertion to be made. That such language was capable of varying interpretations could not be gainsaid.[17]

The *comité d'examen*, in preparing article 8, adopted the first of the Washington Rules with two sensible modifications. The diligence of the neutral to prevent the fitting out of a vessel within its jurisdiction is determined by "the means at its disposal." The neutral is called upon to use "the same vigilance" (*la même surveillance*) to prevent the other acts described.

The question suggests itself whether the duty of the neutral is, according to a reasonable interpretation of article 6, dependent upon the intention of the owner of the vessel which is armed and fitted out in the neutral state. Suppose the intention of the owner is merely, as Dana suggests —

> to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market.[18]

It is not to be anticipated that a court of arbitration would test the duty of the neutral expressed in article 6 by the state of mind of such an individual.[19] The probable employment of the vessel, the likelihood of its engagement in hostilities against a belligerent, are the facts which are made the cause of vigilance. A neutral state may well have reason to believe that a vessel "is intended" to engage in hostile operations although there be no evidence that such is the intention of the vessel's owner.

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[16] Concerning the measure of exertion imposed by the Washington Rules, see Moore's Inter. Law Dig., VII, 1073–1074; also Moore, Inter. Arbitrations, I, 670–678.

[17] That the Washington Rules needed revision was clearly appreciated by the Institute of International Law. The revision, however, which that eminent body adopted at its meeting at The Hague in 1875 has not escaped criticism. For the text of the revision, see Annuaire, I, 139. An English translation is contained in Moore's Inter. Law Dig., VII, 1071, note.

[18] Dana's Wheaton, 563, note.

[19] Compare the *Santissima Trinidad*, 7 Wheat., 283; United States v. Quincy, 6 Peters, 445; United States v. *The Meteor*, 3 American Law Review, 173, sc. Scott's Cases, 711. See also Revised Statutes, secs. 5283, 5284.

Said the Geneva Tribunal: "The 'due diligence' referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part." (Moore, Inter. Law Dig., VII, 1060.)

An amendment to article 8 was proposed by Brazil, which provided that belligerent war vessels under construction in neutral territory should, with their armament, when ordered more than six months prior to the declaration of war, be given over to the officers and crew designated to receive them. The amendment was rejected by the *comité d'examen*. Brazil and Denmark alone favored the proposition. Germany, Norway, Portugal, Russia, and Turkey abstained from voting.[20]

Article 9 declares:

> A neutral power must apply equally to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war ships or of their prizes.
>
> Furthermore, a neutral power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

That impartiality should at all times mark the conduct of the neutral in applying restrictions in the use of its own waters is too obvious to deserve comment. Emphasis of the right of a neutral to exclude a delinquent belligerent seems wise.

Article 10 declares:

> The neutrality of a power is not affected by the mere passage through its territorial waters of war ships or prizes belonging to belligerents.

Such a declaration may signify that the neutral owes no duty to one belligerent to prevent the passage of the other's fleet. The absence of such duty is not, however, decisive of the right of the neutral to prevent that very thing. The language of the article makes no distinction between the various kinds of territorial waters. Such waters obviously include not merely the coastal waters, but also narrows or straits connecting unenclosed seas. The *comité d'examen* felt that a neutral lacks the right to prevent belligerent passage through waters of the latter kind.[21]

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[20] Report to the Conference, 8. Note the attitude of Great Britain at the outbreak of the Spanish-American war, forbidding the further construction and departure from England of a cruiser and torpedo boat, respectively, then building in that country, and purchased by the United States from Brazil prior to the commencement of hostilities. Moore, Inter. Law Dig., VII, 861-862, and documents there cited.

Admiral Sperry declared that the United States could not accept the article by reason of "political considerations implied in the question of the passage through territorial waters." [22]

Article 11 declares:

> A neutral power may allow belligerent war ships to employ its licensed pilots.

If entrance into or passage through the territorial waters of a neutral state by a belligerent war vessel is not unlawful, there can be no impropriety on the part of the former in permitting its own official pilots to render such entrance or passage safe.[23]

Where, however, the service desired is pilotage on the high seas, and that not for the purpose of entering neutral territorial waters, it is open to serious question whether a neutral power should permit its own official agent, such as a licensed pilot, to aid the transit.[24] Although article 11 expresses no limitation as to the zone of lawful service, it is extremely doubtful whether it was intended to permit belligerent employment of neutral official pilots outside of the territorial waters of such states.

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[21] Report to the Conference, 10.

[22] *Id.*, 10. See U. S. For. Rel., 1898, 968–970, with reference to the terms of permission given by Great Britain during the Spanish-American war for the passage of four United States revenue cutters from the Great Lakes through Canadian canals to the Atlantic coast of the United States.

[23] See sec. 2, par. 6, Danish Neutrality Proclamation, April 27, 1904, For. Rel., 1904, 21, 22.

[24] See Rivier, II, 388–391; Oppenheim, Inter. Law, II, 382; Le Moine, Précis De Droit Maritime International, 167.

In the course of a paper by Prof. George Grafton Wilson, read before the American Political Science Association, Chicago, Dec. 28–30, 1904, that careful writer referred to "pilotage by a neutral of an enemy vessel" as a form of unneutral service.

Articles 12 to 16, inclusive, relate to the sojourn of belligerent war vessels in neutral waters.

Article 12 declares:

> In the absence of special provisions to the contrary in the legislation of a neutral power, belligerent war ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said power for more than twenty-four hours, except in the cases covered by the present convention.

Several propositions were presented to the *comité d'examen* with respect to the length of the sojourn of belligerent war vessels in neutral ports. According to the Russian plan it was the prerogative of the neutral to determine the length of time. According to propositions of Spain, Great Britain, and Japan, such vessels could not remain in neutral ports more than twenty-four hours, except under exceptional circumstances. The president of the *comité,* Count Tornielli, of Italy, formulated a plan designed to satisfy the two systems — by giving the neutral the right to fix the duration of the stay, which, in case such right were not exercised, should not exceed twenty-four hours. This was acceptable to the delegations of Great Britain, Japan, and Portugal, but was opposed by Germany and Russia. The latter two States proposed to except from the operation of such a rule neutral ports more or less remote from the theater of hostilities. The German delegation presented an amendment limiting the application of the 24-hour rule to the territorial waters of neutral states, "situated in immediate proximity to the theater of war," except in cases provided for by the convention. To this suggestion Great Britain was opposed, as well as the representative of the Netherlands. The German amendment was rejected in the *comité* by a vote of seven to four. The United States, Spain, Great Britain, Italy, Japan, the Netherlands, and Turkey opposed it; Germany, Brazil, France, and Russia favored it; Denmark, Norway, and Sweden abstained from voting. The same amendment was subsequently presented to the consideration of the Third Commission by Admiral Siegel, and was there also rejected.

M. Tcharykow, in behalf of Russia, proposed a substitute for article 12, which was rejected by the commission.

The article in its present form was accepted by the commission and reported to the conference.[25]

The strongest reason advanced in favor of article 12, as distinguished from the German plan, is that the former embodies a precise rule of conduct, always applicable in the absence of special provisions to the contrary adopted by the neutral.[26]

Article 12 makes no distinction between the belligerent war vessel which enters neutral waters simply *en route* to the theater of hostilities, and that which seeks refuge therein to escape capture. In the latter case, if special legislative provisions of the neutral so provided, a belligerent war vessel might, according to article 12, be permitted to remain longer than twenty-four hours.

It was the opinion of the United States Naval War College in 1904, that a belligerent commander seeking to capture a fugitive vessel would be justified in protesting against a sojourn of the latter for more than twenty-four hours, unless on grounds of special necessity, and not for military reasons; [27] also, that the neutral state would be obliged to intern the vessel thus seeking its protection.

The Naval War College in 1905, pursuing the same problem with respect to the right as well as the duty of the neutral, reached the following conclusion, which in view of the terms of article 12 is peculiarly enlightening:

> The precedents of the Russo-Japanese war have led to the definite acknowledgment of the correctness of the doctrine of internment by neutral states of belligerent vessels seeking refuge from the force of the enemy in neutral ports. This principle has been acknowledged or definitely acted upon by China, France, Great Britain, Germany, Japan, United States, and Russia. These include nearly all the states with considerable navies. Rarely has any principle received such general recognition within so short a period.

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[25] Report to the Conference, 11–16.

[26] Report to the Conference, 14.

[27] Naval War College, Inter. Law Situations, 1904, 79–93. There are there collected neutrality proclamations of various maritime states which employed the 24-hour rule at the time of the Spanish American war.

See also neutrality proclamations of the United States and certain other powers during the Russo-Japanese war. U. S. For. Rel., 1904, 14–35.

See also Rules Adopted by the Institute of International Law at The Hague in 1898, Annuaire, XVII, 285.

It may be safely said that the entrance and sojourn for a period of more than twenty-four hours in a neutral port will render a belligerent vessel which is pursued by the enemy or damaged in battle liable to internment.[28]

Article 13 declares:

> If a power which has been informed of the outbreak of hostilities learns that a belligerent war ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

The necessity for the notification here provided is obvious.

Article 14 declares:

> A belligerent war ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.
>
> The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters do not apply to war ships devoted exclusively to religious, scientific, or philanthropic purposes.

The distinction between the treatment to be accorded belligerent war vessels and those specified in the second paragraph is essential and deserves the recognition here given.[29]

That damage or stress of weather should serve as a ground for the prolongation of the permissible sojourn of the belligerent is reasonable and generally appreciated. The extent of the sojourn for purposes of repair should be considered in connection with article 17.

Article 15 declares:

> In the absence of special provisions to the contrary in the legislation of a neutral power, the maximum number of war ships belonging to a

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[28] Naval War College, Inter. Law Situations, 1905, 154, 170.

[29] Note the treatment accorded the U. S. S. *Monocacy* by China during the Spanish-American war. That vessel was an antiquated ship of light draft employed in Chinese waters for the protection of American citizens. It was permitted to remain in China. See Moore, Inter. Law Dig., VII, 991, citing Mr. Day, Secretary of State, to Mr. Denby, minister to China, No. 1593, June 7, 1898, MS. Inst. China, V, 566.

Concerning the case of a Russian vessel about to sail on a scientific expedition after coaling at a Norwegian port during the Russo-Japanese war, see Takahashi, Inter. Law Applied to the Russo-Japanese War, 353.

belligerent which may be in one of the ports or roadsteads of that power simultaneously shall be three.

That a maximum number of war vessels of a belligerent simultaneously in one of the ports or roadsteads of a neutral should be fixed by international agreement is not open to dispute. That such maximum should not be greater than three seems reasonable and highly advantageous to the neutral.[30]

Article 16 declares:

> When war ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.
>
> The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.
>
> A belligerent war ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

The provisions of the first paragraph were regarded as simply declaratory of the existing rule of the law of nations, and aroused no opposition in the *comité*.[31]

The order of departure of war ships of both belligerents simultaneously in one of the ports or roadsteads of a neutral furnished a problem which provoked discussion. The following plans were suggested: First, that the neutral should control the order of departure; secondly, that the priority of demands should be taken into consideration; thirdly, that the weaker naval vessel should depart first; fourthly, that the order of arrival should determine the order of departure. The last of these met with the approval of the *comité*.[32]

Article 17 declares:

> In neutral ports and roadsteads belligerent war ships may only carry out such repairs as are absolutely necessary to render them seaworthy,

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[30] It will be remembered that this number of Russian men-of-war, under Admiral Enquist, sought asylum at Manila in June, 1905. See Moore, Inter. Law Dig., VII, 992.

[31] Report to the Conference, 18.

[32] *Id.*, 18–19.

and may not add in any manner whatsoever to their fighting force. The authorities of the neutral power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

It will be observed that "ports and roadsteads" are the only waters to which reference is here made. Replying to the inquiry of Sir E. Satow, why other "territorial waters" were not included, it was declared by the reporter that in such waters (other than ports and roadsteads) a belligerent would find it difficult to make repairs; and also that the effectual control by the neutral might not there be always possible.[33]

There can be no dispute that a belligerent war ship should not be permitted to make such repairs as may add to its fighting or military force. This principle is generally accepted.[34]

The extent of repairs absolutely necessary to render a belligerent war ship seaworthy, and the extent of time to be allowed therefor, involve problems which may be raised under articles 14 and 17. The terms of these articles clearly give some latitude to the neutral. The allowance of a few days might not be regarded as improper, or as affording grounds for protest by one of the belligerents. It is not believed that extensive repairs, however necessary, requiring several weeks for their completion, could be justly permitted.[35]

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[33] Report to the Conference, 20.

[34] Such was the position of the United States during the Russo-Japanese war. With respect to the squadron of Admiral Enquist which arrived at Manila early in June, 1905, the Secretary of War, at the direction of the President, telegraphed the Governor of the Philippine Islands on June 5, as follows: "Advise Russian Admiral that as his ships are suffering from damages due to battle, and our policy is to restrict all operations of belligerents in neutral ports, the President can not consent to any repairs unless the ships are interned at Manila until the close of hostilities." (Naval War College, Situations in Inter. Law, 1905, 168.) See also Moore, Inter. Law Dig., VII, 992–995, and documents there cited.

[35] With reference to the Russian cruiser *Lena*, which arrived at San Francisco Sept. 13, 1904, Mr. Adee, Acting Secretary of State, advised the Russian Ambassador Sept. 14, 1904, in part as follows: "If repaired, only such bare repairs can be allowed as may be necessary for seaworthiness and for taking her back to nearest home port, and even such repairs can be permitted only on condition that they do not prove too extensive." (U. S. For. Rel., 1904, 785–786.) In view of the formal application of the captain of the vessel to make needed re-

Article 18 declares:

> Belligerent war ships may not make use of neutral ports, roadsteads, or territorial waters, for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

This article embodies the principle expressed in the second of the Neutrality Rules of the Treaty of Washington of May 8, 1871. Instead, however, of declaring it to be the duty of the neutral to prevent certain uses of its own waters, as is done in the earlier treaty, the belligerent is here directly forbidden to use such waters for the purposes specified. That the prohibition should have been extended to "territorial waters" as well as to ports and roadsteads was eminently wise.

Article 19 declares:

> Belligerent war ships may only revictual in neutral ports or roadsteads to complete their supplies up to amount usual in time of peace.
>
> Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port of their country. They may, however, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.
>
> If, in accordance with the law of the neutral power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

The right of the belligerent to revictual and to take fuel were considered separately. The first paragraph of the article relating to the former was accepted by the *comité*, without difficulty.[36]

With respect to the supply of fuel to be taken by a belligerent war ship divergent views were expressed. Great Britain, on the one hand, advocated a rule that the quantity should not in any case exceed an amount necessary to enable the vessel to reach the nearest

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pairs, which included new boilers, and the reconstruction of the engines, and which would require several months for their completion, the vessel was interned by the United States. U. S. For. Rel., 785–790; Moore, Inter. Law Dig., VII, 999–1000.

Note attitude of Japan with respect to Russian war ships at Shanghai, Aug. 1904. Takahashi, Inter. Law Applied to the Russo-Japanese War, 418–436; also, U. S. For. Rel., 1904, 426.

See also Naval War College, Situations in Inter. Law, 1905, 160–170.

[36] Report to the Conference, 21.

port of its own country. Russia favored an allowance necessary for the continuation of the voyage. Germany urged that a belligerent be permitted to fill its bunkers built to carry fuel.[37] The *comité* charged with the study of the problem found it impossible to reach a unanimous solution. The German plan received the approval of the majority.[38] Its opponents, however, included the United States, Spain, Great Britain, Japan, and China. M. Tcharykow, of Russia, suggested as a compromise a combination of the English and German plans, in the form which was finally adopted as the text of the second paragraph of article 19. This was acceptable to a majority of the *comité.*

The last paragraph of article 19 was an amendment adopted by the Third Commission as a substitute for the following provision formulated by the *comité:*

> Revictualing and the taking of fuel do not give the right to prolong the legal duration of the sojourn.[39]

It is not to be expected that any rule regulating the amount of fuel which a belligerent war vessel may lawfully ship will be regarded with equal favor by states of Continental Europe, Great Britain, Japan, and the United States. Notwithstanding that fact, may it not be open to grave doubt whether the desirability of a rule depends upon the latitude afforded the neutral in adopting a liberal system and thereby enlarging the privilege of the belligerent? Professor Holland, who puts the question in somewhat different form, but with the same inquiry, says:

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[37] At the meetings of the *comité* Sept. 11 and 12, 1907, Admiral Siegel called attention to the difficulty of testing the amount of coal to be shipped by that which suffices to take a vessel to its nearest home port. He said that in each case a series of questions was presented; that it was necessary to ascertain, for example, what was the nearest port, the distance thereto, the speed by which the voyage could be made most economically, as well as the quality of coal to be supplied. He contended, in brief, that the quantity of fuel to be given would change in different situations, and that the neutral would always be obliged to assume the responsibility of determining the number of tons of fuel which the war ship ought to receive. (Proceedings of *Comité,* Sept. 11 and 12, pp. 15–16.)

[38] Sir Ernest Satow, on the other hand, contended that the neutral had no right to assist the belligerent to reach his adversary; that the sole reason why such war ship should be given coal was to prevent the vessel from becoming helpless on the high seas; that it should, therefore, be furnished with coal sufficient to enable it to preserve its existence; that such was the origin of the rule of testing the amount by the distance to the nearest home port, a rule accepted in practice by almost all states which had formulated regulations on the subject. (Proceedings of the *Comité,* Sept. 11 and 12, p. 14.)

[39] Report to the Conference, 22.

> To ask this question may obviously, under modern conditions and under certain circumstances, be equivalent to asking whether belligerent ships may receive in neutral harbours what will enable them to seek out their enemy, and to manœuvre while attacking him.[40]

Article 20 declares:

> Belligerent war ships which have shipped fuel in a port belonging to a neutral power may not within the succeeding three months replenish their supply in a port of the same power.

This provision is plainly reasonable and just.

Articles 21 to 23 relate to the treatment of prizes in neutral waters.

Article 21 declares:

> A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.
>
> It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Under no circumstances other than those specified in the first paragraph should a prize be brought into a neutral port.[41]

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[40] Neutral Duties in Maritime War, Proceedings of the British Academy, II, 6; Moore, Inter. Law Dig., VII, 947.

On the topic "What regulations should be made in regard to the supply of fuel or oil to belligerent vessels in neutral ports?" the United States Naval War College in 1906 concluded, after its usual careful examination of "opinions, precedents, practice, and the aims of a regulation," that "the supply of fuel or oil within a neutral port to vessels in belligerent service in no case shall exceed what is necessary to make the total amount on board sufficient to reach the nearest unblockaded port of the belligerent vessel's own state or some nearer named destination.

"The supply may be subject to such other regulation as the neutral may deem expedient." (Naval War College, Inter. Law Topics, 1906, 66–87.)

[41] Compare note of Mr. Wheaton, minister to Prussia, to Mr. Upshur, Secretary of State, No. 233, Aug. 23, 1843, H. Ex. Doc. 264, 28th Cong., 1st sess., 4, 6. Moore, Inter. Law Dig., VII, 982. See Cushing, Atty.-Gen., 7 Opinions, 122.

As soon, therefore, as such circumstances are at an end, the duty to leave the port is apparent. It is well that there was embodied in the last paragraph of article 21 the provision charging the neutral in such case with the duty not merely to order departure, but also, in case of necessity, to employ all available means to release the prize, with its officers and crew, and to intern the prize crew. That the performance of such a duty is but the exercise of a right possessed by the neutral is not to be doubted.[42]

Article 22 declares:

> A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21.

This requirement is the necessary consequence of the provisions of the preceding article.

Article 23 declares:

> A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.
>
> If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship.
>
> If the prize is not under convoy, the prize crew are left at liberty.

The purpose of this article is to render as remote as possible the danger of the destruction of prizes. Both in the *comité d'examen* and in the Third Commission Sir Ernest Satow demanded the suppression of the article on the ground that it contained no real guaranty against the alleged right of destroying neutral prizes.[43]

The Report to the Conference calls attention to the fact that the provisions of article 23 do not prevent neutral states from excluding prizes from their ports; that the single object is to enable a neutral to receive and guard a prize without violating its duty to a belligerent; and that in so doing the neutral has largest freedom with respect to measures which it may deem necessary to employ for the protection and preservation of the prize.[44]

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[42] See note of the Reporter in *L'Invincible*, 1 Wheat. 238, 244; *The Estrella*, 4 Wheat. 298, 308–309; *The Santissima Trinidad*, 7 Wheat. 283, 350–352.

[43] Report to the Conference, 26.

The value of the provisions of article 23 can only be ascertained by experiment. Any plan which tends to preserve property without imposing an undue burden on the neutral deserves at least the respect of maritime states.[45]

Article 24 declares:

> If, notwithstanding the notification of the neutral power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.
>
> When a belligerent ship is detained by a neutral power, the officers and crew are likewise detained.
>
> The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.
>
> The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

In case a belligerent war ship, after due notification, does not leave a neutral port where it is no longer entitled to remain, the right of the neutral to take whatever measures it may deem necessary to render the ship incapable of further service during the war must be clear to all. That it is the duty of the commander to facilitate the execution of such measures necessarily follows.

The detention of the officers and crew in such case is analogous to the treatment accorded troops of a belligerent which seek refuge in neutral territory. The neutral must itself determine the measures of restriction to be imposed. That such a state should be permitted to accord certain freedom to officers is reasonable and in harmony with modern practice.

[44] *Id.*, 26.

[45] See Oppenheim, Inter. Law, II, 350.

Article 25 declares:

> A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

This articles embodies the principle expressed in the second article of the Neutrality Rules of the Treaty of Washington, May 8, 1871. The Report to the Conference states that the principle itself encountered no opposition, and that the chief effort on the part of the *comité* was to find a declaration which would not impose on neutral states a responsibility out of proportion to the means at their disposal. The language used wisely imposes upon the neutral a duty measured by "the means at its disposal," which, as has been already seen, more aptly describes the extent of the obligation of such a state than the term "due diligence" employed in the Treaty of Washington.[46]

Article 26 declares:

> The exercise by a neutral power of the rights laid down in the present convention can under no circumstances be considered as an unfriendly act by either of the belligerents who has accepted the articles relating thereto.

This article was presented to the *comité* by M. Tcharykow, of Russia. In reply to the objection that such a provision was unnecessary it was argued that the convention itself constituted a wholly new regulation of conduct; that those states which adhered thereto would be extremely desirous of being safe from criticism and complaint if its provisions were followed. It seems fortunate that article 26 was not eliminated.[47]

Article 27 declares:

> The contracting powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent war ships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other contracting powers.

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[46] Report to the Conference, 28.

[47] *Id.*, 29.

Article 28 declares:

> The provisions of the present convention do not apply except to the contracting powers, and then only if all the belligerents are parties to the convention.

Articles 27 and 28 require no comment.[48]

A general conclusion as to the advantages of the thirteenth convention can be of slight value. That its provisions do not impose undue hardships upon a neutral is apparent. The extent of the obligation of such a state is justly declared to be determined by the means at its disposal in every situation. The most striking feature of the convention is the permission given to a belligerent war ship, first, to remain more than twenty-four hours in the waters of such neutral states as may have enacted special provisions permitting such sojourn; and secondly, to fill its bunkers built to carry fuel, in such neutral countries as may have adopted that method of determining the amount to be supplied.

CHARLES CHENEY HYDE.

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[48] The remaining articles (29 to 33) relate solely to the details of ratification, coming into force, denunciation of, and adhesion to the convention, and to the functions to be exercised by the Netherlands Ministry for Foreign Affairs in that connection. For that reason the text is not quoted.

# THE LAUNCHING OF PROJECTILES FROM BALLOONS

In the marked development which has recently taken place in aërial navigation, attention has not infrequently been directed to the practicability of "bombarding" fortified and unfortified places by dropping projectiles from balloons. When exposed to such an attack no place can be said to be "defended," so that the suggestion applies with equal force to fortified places, in the ordinary sense of that term, and to arsenals and fleets. To constitute an international usage, an act must have been so frequently repeated as to enable it to be subjected to classification and orderly arrangement with a view to determine whether it constitutes a lawful act of war. For a number of years past, and especially since the operations of war have been made the subject of conventional regulation, the view has been held by several states of first-class importance that what is not expressly forbidden in these undertakings may be done. From this point of view such a use of balloons as was prohibited in the declaration of 1899 would, in the absence of such a prohibition, constitute a legitimate operation of war.

The launching of projectiles from balloons belongs in the same class of undertakings as the proposition to subject coast cities to ransom at the demand of a powerful fleet: that is, both have been proposed, but neither has been seriously considered by a responsible belligerent; indeed, neither practice has any existence in fact, but both have been regarded as constituting a sufficiently serious menace to humanity to warrant an international conference in formulating prohibitory declarations with a view to prevent their occurrence. There can be no doubt that the measures of prevention to which the peace conferences of 1899 and 1907 resorted were both wise and timely. The instruments with which injury may now be inflicted are, to say the least, sufficiently destructive. Belligerent states are at no loss as to the efficiency of the agencies to which they may resort in the prosecution of the destructive operations of war, and there is abounding wisdom in restricting the employment of the destructive agencies now in use to the elements upon which they are habitually employed.

It will be remembered that the declaration of 1899 was agreed to by the Peace Conference at The Hague for a period of five years; it therefore expired, by its own limitation, on July 28, 1904. The terms of the new declaration are substantially the same as those of the instrument which has expired, and contain the requirement that —

> The contracting powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

A proposition submitted by the Italian delegation requiring the officers and crews of balloons or aërial vessels to belong to the military establishment of the state which maintains them, though accepted by the committee, was not embodied in the declaration. Its inclusion was hardly necessary, as those who direct the movements of balloon and air-ships in the interests of a belligerent become, in the operation of their contracts of employment, a portion of the combatant force of the state which utilizes their services.

The number of states that have not yet signed is somewhat unusual and leads us to express the hope that their signatures will be attached at an early day.

GEORGE B. DAVIS.

# THE EQUALITY OF STATES AND THE HAGUE CONFERENCES

The Second Hague Conference accomplished many valuable results and failed in much that it attempted. Many of its failures have been attributed to a faulty method of organization. The conference itself recognized this defect when on September 21, 1907, it adopted the following *vœu:*

> The conference recommends to the powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding conference, at a date to be fixed by common agreement between the powers, and it calls their attention to the necessity of preparing the program of this Third Conference a sufficient time in advance to insure its deliberations being conducted with the necessary authority and expedition. In order to attain this object the conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the governments with the task of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the conference itself.

It thus becomes a duty to examine the organization of the two Hague conferences with a view to improving conditions in a Third Conference. One of the chief causes of complaint has been the method of voting. In the Hague conferences each state had one vote, of equal weight with that of all other states. To say that this should not be the case is to attack, by implication, what has been for centuries and by most publicists is still considered to be a fundamental principle of international law. In the eyes of weaker states equal voting power for all sovereign states and equal representation on all international tribunals could not be withheld without discrediting the principle of the legal equality of states. During the

Second Hague Conference two parties were formed — one strongly asserting the equality of sovereign states, and the other advocating measures which disregard the doctrine.

What then is this doctrine of the equality of states in international law? One of the most recent statements of the principle is by Moore, who says:

> All sovereign states, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations. (Digest of International Law, Vol. I, p. 62.)

The doctrine was born with the publication of the great book of Hugo Grotius, "De Jure Belli ac Pacis," in 1625. At that time, in the midst of the Thirty Years' War, international anarchy was rampant. The idea of universal sovereignty, derived from Imperial Rome, had been handed down to the Popes. But the contest between the Empire and the Papacy had destroyed faith in either a spiritual or temporal common superior. After the Reformation the notion of a common superior ceased to exist even in theory. The idea of sovereign nations supplanted that of universal empire. Some new principle was needed to take the place of control from above. For a time it seemed as though there would be no check for the strong nation, or succor for the weak. It was here that the work of Grotius found its place. He adopted the theory, well known to his time, that a law of nature controls the relations of man to man, and applied it to the relations between states. This was Grotius' great accomplishment — to find in the law of nature a new and nonreligious ground for international rights and duties. It was a common conception of the age that there had once existed a time when organized communities were not yet formed and when each individual was at liberty to do whatever he wished. Further, that men in such a condition obeyed certain rules discovered to them by their own reason. These rules were called the laws of nature. People were in a state of nature with reference to each other. Grotius used this law of nature in the following manner: No common superior being left to control the relations of states, the states were free and independent, and they were in a "state of nature" with respect to each other, just as individuals were before the organization of communities. Thus, states were bound by a law of nature. As to what the law of nature was, recourse was had to Roman law. Now, the Romans in their judicial system identified the *jus gentium* with the *jus naturale.* That is, when they discovered that there were certain laws common to most of the countries with which they had relations, they came to think of these rules as laws of nature. Grotius followed them in this error, and when he applied the law of nature to states it was really in large part the *jus gentium* which he was using. One of the oft-repeated dogmas of the *jus gentium* was the equality of men. When Grotius applied the system to states, he made an essential part of his legal doctrine the absolute independence and equality of states. He made the theory of equality a cardinal point of his system, and the world of his day adopted it as a necessary corollary of the existence and efficacy of the law of nature. From that day to this the equality of states before the law has been accepted by most international jurists. Some of them have, however, revolted from the doctrine, so that we may with them reexamine the theory to see whether it is really a fundamental principle of international law. Is it a doctrine inherent in the nature of international law with which it is impossible to dispense?

Looking again to the origin of the doctrine, it is immediately apparent that it is based upon a political theory which has long been discarded by political scientists. Historically, there never was such a state of nature as Grotius believed in. As to what the law of nature is, thinkers before and since his time have differed essentially. That there is no such thing as a law of nature which may be treated as a positive code is certain. The contract theory, which had such far-reaching results in its application, premised a state of nature identical with that upon which Grotius relied. The theories of Hobbes, Locke, and Rousseau were evolved as a means of escape from this state of nature. Modern political theorists are able to discard this contract theory by proving that such a state of nature never existed. (Willoughby, Nature of the State, pp. 89–118.) It is shown that liberty in its true sense did not precede the organization of communities, but was a result of it. In such a state of nature as existed *rights* did not exist — only *powers.* Men have rights only when they do not have to fight for them. In a state of nature the stronger or more crafty are able to carry out their desires only by force.

> Natural right as right in a state of nature which is not a state of society is a contradiction. There can be no right without a consciousness of common interest on the part of members of a society. Without this there might be certain *powers* on the part of individuals, but no recognition of these powers by others as powers of which they should allow the exercise, nor any claim to such recognition; and without this recognition or claim to recognition there can be no right. (Green, Lectures on the Principles of Political Obligation, Phil., Works, vol. 2, p. 354.)

> There never was, and there never can be, any liberty upon this earth and among human beings outside of state organization. Barbaric self-help produces tyranny and slavery, and has nothing in common with the self-help created by the state and controlled by the law. Mankind does not begin with liberty. Mankind acquires liberty through civilization. Liberty is as truly a creation of the state as government. (Burgess, Political Science, Vol. I, p. 88.)

Now, in the absence of an international organization, something bearing the same relation to states that states do to individuals, how can states have rights any more than individuals could in their "state of nature?" To say that they have only *powers* dependent upon brute force corresponds very fairly with the events recorded in history since the beginning of separate life for states. And if states have no rights, which are the result of international organization, why is it necessary to premise that their *rights* are equal even "before the law?" It is not intended here to discuss the question of the character of international law as opposed to positive or municipal law; but it is sufficient to say that the phrase "before the law" when used in international and in positive law has quite a different meaning. If we adopt the Austinian doctrine that there is no international law in a true sense; or if we take the view that treaties, customs, etc., sanction an international law for the breach of which the final recourse is war between the interested nations, we must admit that international law has not yet reached the stage of perfection to which municipal law has attained. In the latter case war is but a trial of *powers,* not an assertion of *rights;* since the vanquished nation may be able to bring greater authority for its contention than its stronger contestant. It is through this confusion between the so-called law between states and as exercised over citizens by states that the assumed analogy between men and states has been put forth. Even admitting that before municipal law all men in a state are equal, it does not follow that all sovereign states must be equal before international law.

This fiction of international law has lived a vigorous life for almost three centuries, not on its philosophical merits but from an alternative reason which Grotius made part of his fundamental system. He asserted that states were bound by rules that had received the assent of all or most of their number. (De Jure Belli ac Pacis, Book I, ch. 1, sec. 14.) Thus, when rules had been generally received they were, on his own theory, binding as long as they did not violate plain precepts of natural law. This is the history of the doctrine of equality after its foundation by Grotius upon a false political philosophy.

Certain modern writers support the doctrine of equality almost entirely on this latter ground, *i. e.,* consent. Thus, Oppenheim (International Law, Vol. I, pp. 19–20) says:

> Since the law of nations is based on the common consent of states as sovereign communities, the member states of the family of nations are equal to each other as subjects of international law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the law of nations is a law between, not above, the states.

On page 161 he continues the thought as follows:

> The equality before international law of all the member-states of the family of nations is an invariable quality derived from their international personality. Whatever inequality may exist between states as regards their size, population, power, degree of civilization, wealth, and other qualities, they are nevertheless equals as international persons. The consequence of this legal equality is that, whenever a question arises which has to be settled by the consent of the members of the family of nations, every state has a right to a vote, but to one vote only. And legally the vote of the weakest and smallest state has quite as much weight as the vote of the largest and most powerful. Therefore, any alteration of an

existing rule or creation of a new rule of international law by a law-making treaty has legal validity for the signatory powers and those only who later on accede expressly or submit to it tacitly through custom.

That is to say, states consent to recognize the independence of other states, thereby investing them with a personality. Sovereignty and personality go hand in hand. There are no degrees of sovereignty in the strict sense. A sovereign state is an absolutely independent entity. International law can not look behind this attribute. Therefore, all sovereign states are equal in international law. If it is true that we are estopped in international law from looking back of the attribute of sovereignty, an attribute obtainable only by the consent of other states, the only escape from recognizing the equality of Haiti with France would be to deny the sovereignty of Haiti. It seems very much like putting up a straw-man and being forbidden to look at the stuffing. As a matter of fact, international history discloses a great lack of frankness in the matter of recognition of sovereignty. While retaining the *words* which indicate sovereignty in connection with weak states, strong states have not treated them as sovereign; and have thus begged the whole question of equality. For instance, the United States, while maintaining diplomatic relations with Colombia as with an equal state, recognized the independence of Panama as a result of an *opéra bouffe* revolution. Undoubtedly, this was a violation of Colombia's sovereignty. In the same transaction we see Panama on one day an unimportant province of Colombia, and on the next an independent state equal "in law" both to Colombia and to the United States. Certainly this is juggling with fundamental principles if equality before the law is a result of such intervention and recognition. Even though we admit the force of the suggestion of Dean Gregory that, by analogy to the right of eminent domain, "the world can not be expected to submit to the defeat of a beneficent project of universal importance by the refusal of local sovereignties to grant the use of means that were absolutely essential" (AMERICAN JOURNAL OF INTERNATIONAL LAW, Oct., 1907, p. 973), we can not escape the conclusion that the equality doctrine is violated.

If our conclusions are correct, the doctrine of equality was untrue in its origin, was preserved in international law by a verbal consent which is not followed by performance, and was bolstered up by false analogies growing out of a confusion in thought between international and positive law. Nevertheless, it must be admitted that the adoption of this theory produced many beneficent results. Probably no system for governing the relations between states which was not based upon the accepted dogma of a law of nature would have been accepted by the world of the seventeenth century. Moreover, the theory of the equality of states before the law for many years exercised a restraining influence upon strong states. It gave weak states an admitted principle to which to appeal when dealing with strong states, and fostered a public opinion against immorality in international relations. Moreover, the almost unanimous adhesion of great writers on international law to the doctrine has given it such authority that it is almost heresy to attack it. The foregoing conclusions, however, seem to divest it of any intrinsic merit such as would prevent one from seeking in its place a new doctrine more suited to modern conditions. The doctrine should not, however, be set aside on purely theoretical grounds. We should first be able to show concrete examples in which the doctrine is at least a doubtful blessing. As long as the doctrine was in evidence merely in matters of diplomatic courtesy, affecting the rank of ambassadors, method of signing treaties, military and naval salutes, etc., there could be no serious consequences. These are all matters in themselves of minor importance. Occasionally, however, when great congresses have been delayed from convening by unseemly quarrels over precedence, the matter assumed a more serious aspect. In more recent years the doctrine has been discredited on two distinct but contradictory grounds: First, that it has ceased to operate for the benefit of those states which most need it; and, second, that if allowed to become operative, it will give to weak states too great power in international affairs. In discussing *consent* as a basis for the equality theory we have already illustrated the first ground. The opinion of the Hon. Richard Olney, expressed just prior to the opening of the Second Hague Conference, restates the objection. He says:

> A crowd of international incidents goes to prove the principle to be one almost more active and better known in its breach than in its observance.

> Greece cut off from Turkey and erected into a separate kingdom with its integrity guaranteed; Belgium carved out of Holland as an independent kingdom and its neutrality secured; Switzerland declared to be perpetually neutral and its soil to be inviolable; Egypt, with its overlordship of the Porte and its English occupation; the Crimean War; the treaty of Paris of 1856; the treaty of Berlin of 1878; the Suez Canal; Japan and the comparatively barren results of her victory over China; Venezuela and her arbitrations, territorial and pecuniary; Morocco and the Algeciras conference — these are only some of the more prominent occurrences which demonstrate that the principle of the equality of states, while by no means a glittering generality, can not always be counted upon as a working rule. Its great value should consist in its protection of small and weak states — the great powers being competent to assert and maintain their equality without its aid. But it is in just the cases of inferior states that the principle has been markedly inoperative, so that, regarded as a part of international law, the principle of state equality is found to work where its working might be dispensed with and not to work where its working might be most confidently looked for. (AMERICAN JOURNAL OF INTERNATIONAL LAW, April, 1907, p. 419.)

Objection, on the second ground, has largely found expression in connection with the Hague conferences. The invitation of the Netherlands, dated April 7, 1899, to the invited powers to attend the First Hague Conference, reads as follows:

> My Government trusts that the ——— Government will associate itself with the great humanitarian work to be entered upon under the auspices of His Majesty the Emperor of All the Russias, and that it will be disposed to accept this invitation, and to take the necessary steps for the presence of its representatives at The Hague on the 18th May, next, for the opening of the conference, at which each power, whatever may be the number of its delegates, will have only one vote. (Holls, F. W., The Peace Conference at The Hague, p. 34.)

Of this invitation Mr. Holls says (pp. 34–35):

> These invitations were issued to all governments having regular diplomatic representation at St. Petersburg, as well as to Luxemburg, Montenegro, and Siam. No official explanation of the principle upon which invitations were issued or withheld was given, and any discussion of the causes which led to the exclusion of the South African [and the Latin American] republics, as well as the Holy See, would have to be based upon surmises.

If we consider the First Hague Conference in its original character, not as a world legislature or as a peace congress, but as a diplomatic conference between nations assembled to solve particular problems, the above discrimination in nations invited and the prescribed method of voting are more easily understood. The conference did not, however, hold strictly to its diplomatic character. It enacted rules of conduct designed to be followed not only by the signatory states but by the whole world. From this point of view the conference was a legislative congress made up of delegates from states chosen by the Czar of Russia, and by him arbitrarily assigned an equal voting power in the conference. This legislative character was emphasized when it was prescribed that as a qualification for representation in the Second Hague Conference all states must subscribe to the three conventions adopted by the First Hague Conference.

In spite of the fact that no state need have entered the Second Hague Conference if it had not desired to do so; in spite of the fact that the results of the conference need not be ratified or followed by individual states, the more general representation in the Second Conference, and the character of the work that it attempted to do, stamp it with the trade-mark of a legislative assembly. Nevertheless, no unicameral legislative assembly in the world's history has been organized in a similar manner where not only do all units, great or small, have equal voting power but practical unanimity is required in order to carry a measure. This principle was adopted, no doubt, from a fear that unless the equality of states was thus recognized a meeting of any except the great powers could not have been assembled.

In two notable instances the consequences of this method of voting were put in evidence by the reliance of the minor powers upon the doctrine of equality. The long and exhaustive labors of the conference looking toward a Hague Court of Arbitral Justice, to be in addition to the Permanent Court of Arbitration established by the First Conference, were set at naught by the failure to decide on the distribution of judges for the court. Of this failure the London Times for October 21, 1907, says:

> * * * It was Brazil, at the head of the South American states, which prevented the acceptance of the scheme for a new and permanently effective Court of Arbitral Justice. The scheme was wrecked on the objection of the South American states to the proposed method for the

selection and distribution of judges, which would have relegated these states and others to a second or third rate position by only permitting them to elect judges in a certain rotation of years. The last speech [for an English translation of this notable speech, see The Independent, January 9, 1908, pp. 75–82] of the most industrious and eloquent first Brazilian delegate, M. Ruy de Barbosa, was described by one of the leading continental members of the conference as a "fierce (*farouche*) exposition" of the extreme conception of the equality of all states and governments. The excessive prolongation of the labors of the conference, which at the last plenary sitting was described as having almost constituted an abuse of the hospitality of the Dutch Government, was mainly due to the determination of the United States delegates to "see the Court of Arbitral Justice through" at all costs, and to the equal obstinacy of the South American states in their resolution to prevent the adoption of the project unless it recognized the equality of all governments in regard to the nomination of judges. These conceptions of equality were certainly encouraged by the constitution of the conference, where the votes of Panama, Haiti, or Cuba were of equal value with the votes of Germany, Russia, or the United States of America. Nay, more, the old principle of the Polish veto, the *nie pozalwam,* upon which Carlyle has poured out the vials of his scorn, was revived and maintained, and, although even a strong minority of states could not invariably prevent a scheme from being submitted to the vote of the plenary conference, any single state could prevent any scheme from being adopted in the form of a convention.

Under these circumstances the most that could be done was to call the attention of the signatory powers —

to the advisability of adopting the annexed draft convention for the creation of a Judicial Arbitration Court, and of bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the court. (British Blue Book, Miscellaneous, No. 1, 1908 (Cd. 3857), p. 38.)

The convention relative to the establishment of an International Prize Court of Appeals was adopted only after a prolonged contest which was made upon the ground of the equality of states. As in the case of the Court of Arbitral Justice, it was deemed impracticable to give all the powers equal representation on the International Prize Court; and yet the South American states were unwilling to consent to a representation less than that of Germany or of Russia. The situation is expressed by the Navy (October, 1907):

The proposition to establish a Supreme International Prize Court was ultimately approved at a plenary session of the entire Peace Conference

> on September 21, the vote of Brazil being the only one cast against it. * * * The provision for a system of graduated representation in constituting the Prize Court was regarded by many of the minor nations as an insult to them; and Dr. Barbosa, of Brazil, in particular, fought in favor of equal representation of interested powers in the court. The provision to which Brazil objected especially was the fifteenth article, providing that the judges of the Prize Court appointed for the eight powers — Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia — should sit invariably, but that judges appointed by the other powers should sit only according to a scheme of rotation.

Although the Hague Conference adopted this proposition, it is by no means certain that the governments will ratify the action of their representatives. This repudiation may be made by the great powers on the ground that there is no law for the guidance of such a court, and by the minor powers because their equality is not sufficiently recognized. The convention itself was signed by the representatives of Chile, Cuba, Guatemala, Haiti, Persia, Salvador, Siam, and Uruguay, with " reservations " as to article 15, which deals with the distribution of judges.

Another matter in which the equality theory found expression at The Hague is the so-called Drago Doctrine. In the letter of Señor Luís M. Drago, Minister of Foreign Relations of the Argentine Republic, to Señor Martin García Mérou, Minister of the Argentine Republic to the United States, December 29, 1902, concerning the forcible collection of claims of a pecuniary nature held by citizens of one state against another state, Señor Drago based his objection to such forcible collection on the ground that such action is a violation of the sovereignty of the debtor state. He says:

> Among the fundamental principles of international law which humanity has consecrated, one of the most precious is that which decrees that all states, whatever be the force at their disposal, are entities in law, perfectly equal one to another, and mutually entitled by virtue thereof to the same consideration and respect. The acknowledgment of the debt, the payment of it in its entirety, can and must be made by the nation without diminution of its inherent rights as a sovereign entity, but the summary and immediate collection at a given moment, by means of force, would occasion nothing less than the ruin of the weakest nations, and the absorption of their governments, together with all the functions inherent in them, by the mighty of the earth. (United States Foreign Relations, 1903, p. 2.)

Thus, it is evident that the whole question of intervention is in violation of the theory of state equality. Here, as in the case of the Panama Republic, practice has been at variance with precept. International law is based upon practice as well as principle, and the nineteenth century gives us many examples of armed intervention on one pretext or another.

> The present tendency among publicists is certainly toward the acceptance of the principle of nonintervention as the correct and normal or every-day rule of international law and practice; but to admit intervention as a legitimate exercise of sovereign power in extreme or exceptional cases on high moral or political rather than purely legal grounds, as, for instance, in case of great crimes against humanity (Greece, Armenia, and Cuba) or where essential and permanent national or international interests of far-reaching importance are at stake (Ottoman Empire, Mexico, or Panama). (Hershey, "The Calvo and Drago Doctrines," AMERICAN JOURNAL OF INTERNATIONAL LAW, Jan., 1907, p. 42.)

Without attempting to pass upon the merits of the particular case which was the occasion of the promulgation of the Drago Doctrine, or to say whether the results desired by Señor Drago can be obtained by reference to some other principle, it is evident that the equality of states might be the occasion of much hardship when relied upon by sovereign but bankrupt states.

The fourth subject on the program for the Third International Conference of American States, held at Rio de Janeiro, July, 1906, was —

> A resolution recommending that the Second Peace Conference at The Hague be requested to consider whether and, if at all, to what extent the use of force for the collection of public debts is admissible.

The conference adopted the following:

> *Resolved,* To recommend to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin. (Report of the Delegates of the United States to the Third International Conference of the American States held at Rio de Janeiro, Brazil, July 21 to August 26, 1906, Washington, 1907, p. 14.)

Under the leadership of the United States the subject was considered at the Second Hague Conference, and a convention was adopted, the first article of which is:

> The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.
>
> This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any "compromis" from being agreed on, or, after the arbitration, fails to submit to the award. (British Blue Book, Miscellaneous, No. 1, 1908 (Cd. 3857).)

That is to say, debtor states shall not be coerced in the payment of such debts unless they refuse to submit the question to arbitration, or, having submitted it to arbitration, refuse to abide by the decision. The principle of equality will be respected until such a time as there is evidence of evasion or of bad faith, when the principle of intervention will be resorted to. Thus, while the value of a restraining influence upon powerful creditor states is recognized, the doctrine of equality is repudiated whenever it becomes a cloak for dishonest transactions. On this subject a further significant fact is to be noted. Of the signatures made to this convention up to October 26, 1907, those of the following countries were made with "reservations:" Argentina, Bolivia, Colombia, Dominican Republic, Greece, Guatemala, Peru, Salvador, and Uruguay. These reservations operate for the most part to limit the obligation to submit to arbitration until all legal remedies have been exhausted. Colombia "does not in any circumstances admit the employment of force for the recovery of debts, whatever their nature may be." The reservations are made on the ground that any other method would be in violation of the equality doctrine. Under certain circumstances they may, for those countries, destroy the efficacy of the convention.

These facts have caused much comment in the press and in some cases have resulted in official expression of opinion that a Third Conference can not be assembled unless the equality theory is abandoned. Thus, Sir Edward Fry, first delegate from Great Britain to the Second Conference, in a dispatch to his home Government, dated The Hague, October 16, 1907, says:

> The claim of many of the smaller states to equality as regards not only their independence, but their share in all international institutions, waived by most of them in the case of the Prize Court, but successfully asserted in the case of the proposed new Arbitral Court, is one which may produce great difficulties, and may perhaps drive the greater powers to act in many cases by themselves. (British Blue Book, Miscellaneous, No. 1, 1908 (Cd. 3857), p. 21.)

A letter of Mr. Alfred Stead to the London Times published on October 24, 1907, discusses the question at length:

> SIR: The indignant denunciation by Mr. Choate at the Hague Conference of the rights of minorities in reference to the question of obligatory arbitration brings into timely prominence the very reason for the failure of the conference. This American delegate voiced that arrogant desire for world domination which led the United States to include in the list of states invited to the conference all the minor Central and South American republics with equal voting power to the whole of the European nations, great and small. Had there only been time to create a few more Panamas or Cubas, the United States would have been assured of an absolute majority in the conference — that is, a majority of voting unities, not of international weight. In the present conference it may well be, and indeed generally must be, that the weight of world opinion is in the minority, and that the "overwhelming majority" of the actual vote is of no practical value. Unduly desirous of good relations with the United States, the European nations have submitted to an extraordinary amount of interference in their affairs, and have acquiesced in a situation at The Hague which has enormously put back international progress. Theoretically, it may be very fine to include all and sundry states or pseudo-states, but it nullifies all possibility of accomplishment. Were the South Central American republics and the West Indian states capable of regarding questions from other than a local standpoint, the danger might be minimized; but, as it is, they are so full of their localized hobbies, be they the Drago Doctrine or others, that international discussion or progress is impossible.
>
> The United States itself is less international than other great powers, and the conduct of its delegates has often shown an appalling disregard and ignorance of European ideas. That this is due largely to the supine submission of the European states to the American autocracy does not lessen either its truth or its danger. It is safe to say that unless conditions be enormously altered there will be no Third Conference — or, if there be one, it will be one in which there must be delegates from every British colony and possession, from Abyssinia, Afghanistan, Morocco, Liberia, San Marino, etc. Why should not any of these most estimable states be as much entitled to a vote as Haiti or Costa Rica? That the conference has failed is due to two reasons, the action of the United States and the subservient fear of America prevalent in Europe. It is

of value to glance at the real situation for a moment in order to realize how unfounded is the claim of America to run the business of the world. At the First Hague Conference there were twenty-six powers represented, of whom twenty were European, two were American, and four Asiatic. Eight years later the situation was totally changed and forty-six powers sent delegates; Europe supplying twenty-one (Norway having become a separate state), Asia the same four, but there being twenty-one states in America represented! Truly an enormous advance in eight years, and one which might lead one to imagine that the center of world power had forever left Europe. The great majority of these American states, however, exercise not one iota of influence on the international situation, nor is there any immediate prospect of a change. Even including the United States, the American nations, possessing equal voting power with the European nations, are far behind in every respect making for international force. The European states, with their colonies, represent 64.9 per cent of the area of the globe, the American states only 24 per cent. As regards population, the European states, without colonies, form 44.2 per cent to the American 12.7 per cent; while with colonies the proportion is 62.7 per cent to 9 per cent. Taking the question of commerce, the European states have a yearly movement of 80.5 per cent of the total, to the American 16.4 per cent; while in the amount of postal matter Europe stands to America in the relation of 68 per cent to 28.7 per cent. These are only a few instances, which might easily be multiplied; but all tend to demonstrate the lack of equity in allowing equal voting power to the Americans. And besides Europe there are the four Asiatic powers represented, with the following proportions: Area 11.1 per cent, including colonies; population 43.1 per cent without colonies, and 28.3 per cent with dependencies.

Study of these figures can not fail to be profitable, and may bring home to the minor American states that, save perhaps in volume of oratory, they occupy a very small position in the comity of nations, and that their voting power in the conference is out of all proportion to their international significance. One lesson there is also for Europe, and that is the need of organization within herself to withstand American domination and interference, which is bound to override all the most treasured ideals and beliefs of Europe if allowed unchecked sway. There is opportunity for the German Emperor to mark the close of the fiasco at The Hague by the publication of another cartoon, in the nature of his Yellow Peril *tour de force,* with the motto, "Peoples of Europe, defend yourself against the American domination."

Yours truly,

ALFRED STEAD.

4, CHELSEA-COURT, S. W., *October 14.*

Mr. Stead is inconsistent in attacking the United States for the desire to have the Central and South American states represented in the conference, while viewing with complacency the equal voting power in the conference of such European states as Bulgaria, Luxemburg, Montenegro, Roumania, and Servia, as well as Persia and Siam. Certainly, Brazil is entitled to equal voting power with Montenegro. But making allowance for the anti-American sentiment with which the letter is pervaded, it expresses well the objections to the participation on equal terms of all sovereign states in a world conference. M. W. Hazeltine, in an article on "The Second Peace Conference" in the North American Review, December, 1907 (p. 580), acknowledges that "there is a good deal of force in the reasons adduced * * * by Mr. Stead, for asserting that the Third Peace Conference, should one ever be called, ought to be organized on a different principle."

The Times for October 19, 1907, under the heading "The Hague Fiasco," gives a general condemnation of the method of voting, impartially treating all weak states. It is there said:

> The conference was predestined to fail, because the convocation of such a body at all was based upon a gross violation of the "law of facts." * * * The only principle upon which all these powers could be induced to send delegates to it was the legal and diplomatic convention that all sovereign states are equal. For certain purposes that convention is useful, but, on the face of it, it is a fiction, and a very absurd fiction at that. Everybody knows that all sovereign states are not equal. The differences between them in population, in territory, in wealth, in armed strength, in their habits of thought, in their conceptions of law and right — in all that goes to make up civilization — are among the most obvious and insistent of facts. By pretending to ignore this fundamental and essential truth, the conference condemned itself to impotence. The simplest common sense is enough to teach us that powers like Great Britain, France, Germany, Japan, Russia, and the United States will not, and can not, in any circumstances, allow Haiti, Salvador, Turkey, and Persia to have an equal right with themselves in laying down the law by which their fleets, their armies, their diplomatists, and their jurists are to be guided on matters of the supremest moment. The suggestion that they should submit to such a doctrine is simply fatuous. Such submission would involve the subjugation of the higher civilization by the lower, and would inevitably condemn the more advanced peoples to moral and intellectual retrogression.

Professor Westlake, in an article in the Quarterly Review, January, 1908 (pp. 227–230), comments on the organization of the conference as follows:

> The Peace Conference of 1907 * * * marked its popular affinity, if not its popular origin, by adopting the forms of a legislature, indeed of a democratic legislature, short only of the point at which those forms usually bear the fruit for the sake of which they have been devised. Speeches and votes gave a parliamentary air, not only to committees, subcommittees, and drafting committees, but even to full sittings. For the purpose of announcing the result of a division the votes of all states were treated as equal. For the purpose of carrying any matter a stage further they were treated as unequal. * * * It appears to us that in the future *all voting had better be avoided.* No doubt, if agreement was not to be made a rigid condition, voting seemed inevitable to all who were unable to think except in the forms of democratic government, but with it, on the same democratic principles, there was bound to come the equality of votes for the purpose of display, and with that again, as we have seen, the worthlessness of votes for any purpose but that of display. The equality may have given a temporary satisfaction to the political feelings of many who joined in the cry of distress for which they hoped the conference would find a remedy, but the worthlessness must have taught them that votes were not helping them in the noble effort to bring international action under responsibility. The equality of votes flattered the small states, of which, not to mention that strength must always tell, the opinion on international doctrines is diminished in value by their inexperience of the situations to which they have to be applied. But that pleasure must have vanished when they found that the delegations of the larger states were prevented by the force of things from admitting them to a real equality.

The Navy for November, 1907, says:

> The law of facts appears to us to have been disregarded by the very constitution of the conference. It has been said many times that the *real international law* is made by the nations which have the physical force to compel respect for their opinions; and this is undoubtedly true. * * * International law, like any other human law, rests, in the last analysis, on the foundation of physical force. This force is possessed only by the relatively few great powers; and it is unreasonable to expect them to put their — to them — supreme interests in matters of international law at the disposal of a conference in which all the recognized great powers can be outvoted by a group of nations which can not all together muster the physical power of even one of the greater nations.

Thus, we find that the doctrine of equality failed of complete vindication in the Drago Doctrine; that in the case of the International Prize Court it almost prevented action but was finally repudiated; that in the case of the Court of Arbitral Justice it made inoperative the labor of many months; and that it has so seriously affected confidence in the work of the Hague conferences that doubts have been entertained whether a Third Conference with the old organization could be successfully assembled.

If the doctrine of the legal equality of states is no longer of unalloyed value, if it acts as a deterrent to the solution of great questions looking toward the progress of the world, it surely should be abandoned in favor of a better principle, if such a principle can be found.

A logical solution of the problem would be a return to that condition which existed before the theory of equality was expounded — namely, the universal monarchy which was represented by Imperial Rome. As this is neither practical nor desirable it need not detain us. Another substitute, the chief advocate of which is Prof. T. J. Lawrence, is that represented by the Concert of Europe. Professor Lawrence, in "The Primacy of the Great Powers" (V. Essays on Some Disputed Questions in Modern International Law), expounds this doctrine at some length. He demonstrates that historically the doctrine of equality was not followed in European affairs whenever the subject-matter was of great importance. What actually happened was that a few states, denominated the "great powers," formed themselves into a concert for the administration of the international affairs of Europe; that not only have they dealt with affairs affecting themselves alone, but also affecting other states not admitted into the concert; that these minor states have been obliged to acquiesce in the conclusions of the concert, whether agreeable to themselves or not. Professor Lawrence says, commencing on page 226:

> The foregoing examples by no means exhaust the subject, but they are sufficient to show that the great powers have by modern usage a position of preeminence in European affairs which is so marked, and has such important legal results, that the old doctrine of the absolute equality before international law of all sovereign states is no longer applicable. It is not merely that the stronger states have influence proportionate to their strength; but that custom has given them what can hardly be distinguished from a *legal right* to settle certain questions as they please, the smaller states being obliged to acquiesce in their decisions. At present this right is in a rudimentary stage; but it tends steadily to increase in importance. Great living statesmen build their best hopes for the just and peaceful settlement of international disputes upon the preservation

> of the European Concert; and the European Concert means nothing more nor less than the agreement of the six great powers. * * * The Concert of Europe exists as a kind of international court of appeal; and incidentally it sometimes assumes legislative functions, as when by the neutralization of Switzerland, Belgium, and Luxemburg it virtually imposed new rights and obligations on states who may be brought into contact with them, or when in 1878 at Berlin it decreed that on certain conditions Servia and Roumania should be raised to the rank of wholly independent powers * * * [p. 230]. It seems clear, then, that the six great powers have by modern international law an authority superior to that of other states; but that the method of exercising it, and the subject-matter with respect to which it should be exercised, are by no means fully defined. * * * But when the great powers have come to an agreement on any question they generally find means to make their decision respected. * * * We have not yet arrived at a formal European Areopagus. All we have at present is a very real superiority *before the law* on the part of the great powers. Whether that superiority will develop into a properly organized court of appeal, with sufficient wisdom and justice to decide international controversies aright, and sufficient power to enforce its decisions, time alone can decide. * * * The great powers act on behalf of others as well as themselves. They speak in the name of Europe, and bind it by their decisions.
>
> It seems to me that, in the face of such facts as these, it is impossible to hold any longer the old doctrine of the absolute equality of all independent states *before the law*. It is dead; and we ought to put in its place the new doctrine that the great powers have by modern international law a primacy among their fellows, which bids fair to develop into a central authority for the settlement of all disputes between the nations of Europe. * * *

This was written in 1885. In 1905, Oppenheim (Vol. I, pp. 162–164) comments unfavorably upon this doctrine, as follows:

> The enormous differences between states as regards their strength are the result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy. Politically, states are in no manner equals, as there is a difference between the great powers and others. Eight states must at present be considered as great powers — namely, Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, the United States in America, and Japan in Asia. All arrangements made by the body of the great powers naturally gain the consent of the minor states, and the body of the six great powers in Europe is therefore called the European Concert. The great powers are the leaders of the family of nations, and every progress of the law of nations during the past is the result of their hegemony, although the initiative towards the progress was frequently taken by a minor power.
>
> But, however important the position and the influence of the great

> powers may be, they are by no means derived from a legal basis, or rule. (*Note.* — This is, however, maintained by a few writers. See Lorimer, I, p. 170; Lawrence, p. 241; and Westlake, I, pp. 308–309.) It is nothing else than powerful example which makes the smaller states agree to arrangements of the great powers. Nor has a state the character of a great power by law. It is nothing else than its actual size and strength which makes a state a great power. Changes, therefore, often take place. * * * It is a question of political influence, and not of law, whether a state is or is not a great power. Whatever large-sized state establishes an army and navy of such strength that its political influence must be reckoned with by the other great powers, becomes a great power itself. (*Note.* — In contradistinction to the generally recognized political hegemony of the great powers, Lawrence (§§ 134–136) and Taylor (§ 69) maintain that the position of the great powers is *legally* superior to that of the smaller states, being a "primacy" or "overlordship." This doctrine, which professedly seeks to abolish the universally recognized rule of the equality of states, has no sound basis, and confounds political with legal inequality.)

The contention of Mr. Oppenheim that the primacy of the great powers can not be a *legal* doctrine can have little weight if we admit that international law is based on practice; for practice certainly supports the contention of Professor Lawrence. Moreover, in the dispatch of Sir Edward Fry previously quoted (pp. 542–543) the adoption of this principle is openly advocated.

The doctrine of the primacy of the great powers has thus far been noticed only in its relation to European affairs. Taylor (International Public Law, p. 418) and others treat the primacy of the United States on the American continent as constituting an American Concert, substantially equivalent in character to the European Concert. Richard Olney (AMERICAN JOURNAL OF INTERNATIONAL LAW, April, 1907, p. 425) dissents from this view. He asserts that the attempt to base any such claim upon the Monroe Doctrine is not justified by the facts, and that the claim if successfully asserted would be unfortunate in its results. Regarding the primacy of any one state he says:

> The will of a single state, however mighty, is much too narrow a basis on which to build international law, and were a single state to take the place of the European Concert, it would — even if in every way as powerful as the concert — be immeasurably inferior to it in point of international influence and authority.

He, however, commends a properly constituted American Concert as follows:

> That an American Concert of purely American states would occupy a position in America practically equivalent to that of the European Concert in Europe; that it would tend to avert wars between states as well as insurrections and revolutions within states; that it would do much to further trade and commerce and intercourse of all kinds between the various American states; and that the United States, as a leading member of the concert, might be counted upon as an agency for good even more potent than if acting in the invidious rôle of sole supreme dictator, seem to be tolerably sure results.

The doctrine of the primacy of the powers, however, lacks one great element essential to any scheme that can be reasonably expected to be assented to by all states. It fails to give any deliberative voice at all to minor states even when their own interests are vitally affected. This does not seem to be in accordance with any fundamental principle of justice, or to have within itself the possibility of any permanent solution of the problem of world organization. It is the problem of constructive statesmen not only to choose the best of settled practice for observation, but to guide the world if possible to a better practice. We have seen that the equality theory is far from perfect, and that the theory of the primacy of the powers is open to very serious objections in that it does not recognize any influence at all as existing in minor powers. Neither of the theories are true to the facts. It seems to us that the true problem is *to find the facts of international life,* and to devise a scheme for the adequate representation of all elements in their true proportions. All schemes for determining the relations of states either in peace or war, which have for their purpose only the settlement of individual disputes — such schemes, for instance, as *voluntary* arbitration — are open to the objection that they are based on no enduring principle and leave the arbitrators without any standard to which problems may be referred. Much valuable work has been done upon what are known as the "economic" and "religious and educational" solutions of the problem. Really all of these theories are but steps in progress toward the discovery of the "law of facts" in international life. They lead to a realization of the *interdependence* rather than the independence of states. Frederick Seebohm, in his "International Reform," 1871, lays down two principles:

> (1) That the interdependence of progressive states is necessarily progressive.
>
> (2) That progressive recognition *de jure* of this interdependence *de facto* will necessarily result from experience of its material effects. (Lorimer, Institutes, vol. 2, p. 213.)

The realization of these incontestable facts has been promoted in recent years by a new method of studying geography under the name of Anthropogeography. By it the essential oneness of the world's life is emphasized, and it becomes evident that no two nations can engage in war without diverting their surplus products from the channels in which the economic prosperity of the world demands that they should flow. (For a discussion of this subject, see Worcester Telegram, June 10, 1906.)

The writer on international law who has treated the whole subject from a strictly scientific point of view, attempting to deal in a practical manner with all questions, being neither too optimistic nor too pessimistic concerning the psychology of man and of nations, is Dr. James Lorimer, in his work published in 1883–1884 under the title "The Institutes of the Law of Nations; a treatise of the jural relations of separate political communities." He attempts to analyze the principles which underly the relations of states, to study those which have been considered fundamental, impartially, without regard to the sanctity which a long line of noble writers has given to them. And after considering them all, he sets forth his own solutions with a dignity consonant with his great accomplishments in other lines of legal endeavor. The fact that he prescribed in detail a scheme of world organization brought upon him much criticism and some ridicule; but as a study of underlying principles his book can not be overlooked. His doctrine is succinctly stated in volume 2, page 260, of his Institutes:

> All states are equally entitled to be recognized as states, on the simple ground that they are states; but all states are *not* entitled to be recognized as *equal* states, simply because they are not equal states. Russia and Roumania are equally entitled to be recognized as states, but they are not

> entitled to be recognized as equal states. Any attempt to depart from this principle, whatever be the sphere of jurisprudence with which we are occupied, leads not to the vindication but to the violation of equality before the law.

His plea is, then, for proportional recognition of states according to facts, not according to a rule set up in violation of the facts. Of the approved and current doctrine of recognition, he says:

> In any other sense than as a rule for the admission into, or exclusion from, the family of nations, no doctrine of recognition has been considered possible; and with the exception of some formalities of diplomatic etiquette, now almost obsolete, old states and new states, great states and small states, states that have rational forms of government and states that have irrational forms of government, have been left to scramble for ascendency as best they might. (Lorimer, Institutes, vol. 1, p. 169.)

He holds that the only way in which the doctrine of recognition in international law can be logically and rationally applied is to recognize "that all states are equally entitled to assert such rights as they have," so that they all have an equal interest in the vindication of law; not that all states have equal rights. He pleads for relative recognition in which are considered the forces themselves, and in which the value of a state "is measured by the influence which it is in a condition to exert in determining the direction of international action." In estimating the international value of states as a ground for their relative recognition, he suggests the following factors to be taken into account (vol. 1, p. 182):

> 1st. The extent or size of the state, or the quantity of materials of which it is composed.
> 2d. The content or quality of the state, or of its materials.
> 3d. The form of the state, or the manner in which its materials are combined.
> 4th. The government of the state, or the manner in which its forces are brought into action.

The grading of states is to be done by the so-called great powers, who themselves are to be considered as equal. He thus recognizes for a limited purpose the primacy of the great powers. Based upon the doctrine of interdependence rather than of independence, with the principle of relative rather than absolute recognition of states in the family of nations, he proposes a scheme for the organization of an international government. First, he suggests a *proportional* disarmament, leaving the relative armed power of the nations the same. Second, an international government having legislative, executive, and judicial departments. In the legislative department he would have two chambers, a senate and a chamber of deputies. Each senator would have one vote. Senators would be appointed for life by the central authority of each state acting with its upper house. The deputies in the chamber of deputies would be chosen by the lower house in each state. "Each of the six great states — Germany, France, Russia, Austria, Italy, and England — shall send five senators and fifteen deputies; and each of the smaller states shall send a number proportioned to its international importance, as measured by population, area, free revenue, and the like, as those shall be determined by the representatives of the six great powers." Each deputy would have only one vote. The number of senators would be in the proportion of one to three of the deputies sent by each state. Majority vote would rule. There would be a bureau of ministry consisting of fifteen members, five senators chosen by the senate, and ten chosen by the chamber of deputies. They would be elected annually, and the bureau would always have one representative of each of the six powers. The bureau would elect the president of the international state from among its own members, who would be president of the senate *ex officio*. He would hold office for one session only, but would be reeligible each alternate session. In the judicial department the judges would be appointed by the bureau, the president in case of equality having the deciding vote. There would be fourteen judges and a president, six of whom, at least, would be chosen from the six great powers, one from each. For the execution of law there would be an international fleet and army, each state furnishing a proportional contingent of ships and men, or the equivalent in money. For the support of the government there would be an international tax levied by each state on its citizens. (Lorimer, Institutes, vol. 2, pp. 279–287.)

Whatever opinion one may hold about the practicability of the scheme, one must admit that it is the logical conclusion of the whole argument of the book. The world was not ready for any such organization in 1884, when the book was published, and it probably is not yet ready for it. The Hague conferences are an advance which Professor Lorimer doubtless would have considered unlikely at so early a date. They have brought us to a consideration of the very points upon which he laid greatest stress. However impossible the solution of the great problem may seem, it is a problem which is inevitable if progress is not to be limited by arbitrary barriers. It will be observed that the functions of the legislative, executive, and judicial departments are very broad and of great importance; that they seem to wield an authority superior to the states. But they wield this authority as a result of two conditions: First, a recognition of the actual relationship between states, so that the legislative body really represents the civilized world; second, that the representatives, chosen indirectly by the people, not by the crown or the presidents of the individual states, vote individually and not by states. Their point of view is the progress of their nation as a result of the progress of the world. It is conceivable, therefore, that the representatives of the same state should vote on opposite sides of a question.

Another contribution toward the solution of the problem of world organization, of more recent date than Lorimer's, is that published by E. Duplessix, in 1906, with the title "La loi des nations. Projet d'institution d'une autorité internationale Législative, Administrative et Judiciare. Projet de code de droit internationale public." This work was crowned by the Bureau International de la Paix. It is by no means as pretentious an effort as the two volumes of Lorimer, and does not attack the subject in as scientific or fundamental a manner as does Lorimer. The general principles of international law contained in it are professedly derived from one author, Despagnet. The book is divided into four parts: (1) Prolégomènes, (2) Programme d'une Conférence internationale préparatoire à la constitution d'une Union de tous les États civilisés, (3) Projet de traité international, (4) Projet de Code de droit international public. While asserting the absolute equality of states before the law, without going deeply into the question of what "before the law" means, Duplessix proposes a proportional representation in the world organization. On page 22, discussing the means of representation in the world legislature, he says:

> Il sera particulièrement difficile d'attribuer à chaque État dans les Assemblées internationales une part de représentation qui satisfasse tous les désirs et toutes les ambitions sans compromettre les intérêts généraux de l'Union.
>
> Une représentation proportionnelle au nombre des habitants conduirait à une représentation innombrable pour les grands Etats. * * * D'un autre côté, il serait fort désirable d'accorder voix délibérative à certains petits États qui jouissent d'une grande considération; mais on ne peut cependant leur accorder un nombre de voix assez grand pour donner a l'ensemble de ces nombreux États une représentation dominante ou même seulement très importante dans l'organisme international.
>
> Il faut bien, enfin, assigner une limite au droit de représentation direct, car on ne saurait demander à des États minuscules d'être toujours à même de recruter parmi leurs nationaux des législateurs, des administrateurs et des jurisconsultes très savants et très expérimentés pour siéger dans les Assemblées internationales.

According to these principles he works out (p. 27) the "Mode de représentation des États" in the preliminary conference called for the purpose of making a permanent organization.

> Les États seront représentés à cette Conférence par des délégués spéciaux, lesquels ne pourront, pendant sa durée, exercer aucune autre fonction. Les États dont la population ne dépasse pas dix millions d'habitants seront représentés par un délégué; ceux dont la population est supérieure, par un délégué à raison de dix millions d'habitants, sans que le nombre de ces délégués puisse dépasser trois pour le même États.
>
> Pour le calcul du nombre des délégués, les confédérations d'États ne comptent que pour un seul État, les colonies se réunissent a leurs métropoles et les pays de protectorat ou vassaux aux pays protecteurs ou suzerains.
>
> Chaque délégué n'aura droit qu'à une seule voix, quelle que soit l'importance de la nation représentée.
>
> Les États dont la population est inférieure à trois millions d'habitants pourront se réunir pour nommer des délégués ayant voix délibérative à la Conférence, et, dans ce cas, le groupe qu'ils formeront aura droit à un délégué par dix millions d'habitants, sans pouvoir dépasser le maximum de trois délégués.
>
> Dans tous les cas, ces États pourront envoyer à la Conférence des délégués particuliers, mais ceux-ci auront seulement voix consulative et non délibérative.
>
> Un délégué suppléant sera adjoint à chaque titulaire.
>
> Les membres de la Conférence nommeront en dehors d'eux un Comité

de juristes ayant une connaissance approfondie du droit international. Ce Comité sera chargé de procéder, sous leur direction, à l'élaboration et à la rédaction du projet de Code ci-après prévu.

This conference would be in the nature of a constituent assembly, which would draft an international treaty to form a "Union des États civilisés." The organization proposed by Duplessix in the treaty which he projects includes a legislative assembly, an executive committee, and a court of justice. The composition of these "corps" would be identical, and the method of representation in them would be the same as in the constituent assembly, already quoted. A quorum consists of three-fourths of the delegates, and an absolute majority is necessary for a vote in each "corps." In the legislative assembly unanimity is necessary for the adoption of any addition to or modification of existing law. But if a proposition of this kind does not receive a unanimous vote, and if its failure is deemed prejudicial to the interests of the union, the question may be resubmitted, and an absolute majority will serve. Those states of which the whole delegation is agreed may withdraw from the conference if they wish to do so.

Both Lorimer and Duplessix agree in proportioning the representation in the world organization to the actual value of the state in international affairs. Lorimer leaves the grading of the states to the great powers. Duplessix gives a definite scheme for determining the relative value of states on the score of population. He recognizes the desirability of unanimity in passing acts, but makes the absolute majority alone necessary to the final decision. We need not pass on all the details of the two schemes in order to make their application to the organization of the Hague Conference. In the method of representation and of voting they agree. And we submit that it would be more in accordance with the facts if the principle of the inequality of states, recognizing actual facts and not being bound down by rules in the observance of which there is such diversity between precept and practice, were adopted.

Of course the objection will be raised that the sovereign states of the world will not consent to enter into any conference in which they do not have equal voting power. The old argument will be made that this would be an admission of inferiority, and in derogation of their sovereignty. If such would be the result there is something fundamentally wrong with Lorimer's plan. He, however, based his whole work upon a definition of international law intended to exclude such a conclusion:

> The law of nations is the realization of the freedom of separate nations by the reciprocal assertion and recognition of their real powers. (Lorimer, Institutes, Vol. I, p. 3.)

In our discussion of the so-called natural law, we have shown that liberty is a result of organization, and is not destroyed by it. It seems inevitable to conclude that a proper organization between states, clothed with proper authority, would produce truer liberty for states, just as it does for men. Moreover, the frank recognition of the real position of states should be the greatest possible incentive to growth in weaker states. This is not mere supposition; for we have at least one instance of a state stirred from its lethargy by its lack of influence in the Second Hague Conference. Chien Hsün, Chinese Minister to Holland, and a delegate to the Hague Conference, has presented a memorial to his Emperor, which is notable because it comes from the representative of a nation which for centuries has asserted its superiority to all other states, and because of its simple wisdom. (London Times, February 20, 1908, p. 4.) The memorialist frankly admits the predominant position of the eight great powers, but asserts that no state need be permanently weak:

> The distinction between strong and weak depends on the efficiency or otherwise of the country's governmental system, methods of law, and military and naval preparations. * * * Your servant feels, on reviewing the international situation as well as that of China herself, that unless perfection be obtained by her in the essentials above mentioned * * * it is impossible to predict the treatment which we shall receive at the hands of the powers at the next conference.

He then proposes a definite scheme for reorganizing the legal and educational system of China, considering the interval between the second and third Hague conferences as a "providential opportunity" for accomplishing this work:

If by so doing both our political and legal systems could be brought into order in the next four years, China would be in a position to show that she could hold her own with the other powers when the invitation to the next conference reaches her. If she could at the next conference win a position among the great powers such as that which Japan holds at the present day, what an unspeakable blessing it would be for our country!

In the formation of the United States we have an example of sovereign States combining together in a union in which their complete equality is not recognized. This illustration is all the more suggestive since there is such diversity in the area and population of the various States. The State of Rhode Island is smaller than Montenegro, while the State of Texas is larger than the Austrian Empire with Bavaria and Würtemberg thrown in. (Fiske, American Political Ideas, pp. 96–97.) Perhaps in this fact is a suggestion for a like compromise in the world legislature. Might it not be composed of two houses, in one of which equality would be recognized as in the United States Senate, and in the other inequality, as in the United States House of Representatives?

Another historical instance is that of the German Empire. Although the states now forming the Empire were formerly independent, they have unequal representation in both houses of the legislature. In the Bundesrath, twenty-five commonwealths are represented by fifty-eight voices, which are distributed as follows: Prussia, seventeen; Bavaria, six; Saxony and Würtemberg, four each; Baden and Hesse, three each; Brunswick and Mecklenburg-Schwerin, two each; the others, one each. In the Reichstag the representation is according to population. Fully three-fourths of the members are from Prussia.

Further, there are indications that minor states are willing to accept the principle of inequality when their duties may be decreased thereby, without prejudice to their rights. For instance, for the purpose of apportioning the expenses of maintaining an International Bureau, the countries of the Universal Postal Union are divided into seven classes, each contributing in proportion to a certain number of units. Thus, we see Brazil content to pay the amount assessed upon a power of the third class, and Montenegro does not complain of being in the seventh class. (Union postale universelle: Washington, June 15, 1897.) Again, the finances of the International Bureau of the First Hague Conference are provided for by article 29 of the convention for the peaceful adjustment of international differences as follows:

> The expense of the Bureau shall be borne by the signatory powers in the proportion established for the International Bureau of the Universal Postal Union.

The same principle has been adopted in other unions, namely, the International Union of Railway Freight Transportation, the Telegraphic Union, and the International Institute of Agriculture. The International Bureau of the American Republics is maintained by appropriations of the American Republics made in proportion to their population. The twenty-one Republics represented on the Governing Board are, in order of population, United States, Brazil, Mexico, Argentine Republic, Chile, Peru, Colombia, Venezuela, Bolivia, Cuba, Haiti, Guatemala, Ecuador, Salvador, Uruguay, Paraguay, Dominican Republic, Honduras, Nicaragua, Costa Rica, and Panama.

If minor states are willing to compromise the doctrine of equality where duties are concerned they ought not to object to a proportionate diminution of their rights. The favorite maxim of Dr. Francis Lieber was, "No right without its duties, no duty without its rights." The Latin American states and other lesser powers, when demanding equal voting power at The Hague and equal representation upon its permanent courts, are asking rights out of all proportion to the duties that they are able to perform. And when all objections have been stated, the fact still looms up that however impracticable or difficult may seem the substitution of a doctrine of interdependence for independence, of inequality for equality, of proportional or relative for absolute recognition, it is a problem that is inevitable if the work commenced at The Hague is to bear its full fruit in the advancement of the world. Individual liberty as a result of government has reached a high degree of development. National states are everywhere fostering this liberty. The proper organization of the Hague conferences means a partial realization of the ultimate purpose of the state which Burgess (Political Science, Vol. I, p. 85) characterizes as the perfection of humanity and the civilization of the world. The preliminaries of such a reorganization, prior to the convening of a Third Conference, lie in the field of diplomacy. The lead must be taken by the great powers, and among these the United States as chief representative of the Western Hemisphere has the plain duty of taking the initiative. Professor J. Westlake, speaking of the failure of the Second Hague Conference to agree on a plan for choosing the judges for the Court of Arbitral Justice and the wish of the conference that an agreement be reached by diplomatic means, attributes to the United States a realization of its commanding duty. He says:

> There is a reason to believe that the Government of the United States is disposed to press on the Spanish American states and Brazil the institution of a court of arbitral justice for America in accordance with the plan annexed to the *vœu* of the conference. It is obvious that that can only be done if the smaller American republics will consent to waive their cherished equality in the nomination of the judges; but such a result is not unlikely, the influence of the United States being great, and common sense having a better chance to prevail in pure diplomacy than under the incentive to self-assertion supplied by a world-wide assemblage with nominally equal voting. (Quarterly Review, January, 1908, pp. 235–236.)

With the exception of the Panama affair, America has always stood for the rights of the weaker nation. Witness the Shimonoseki affair and the return of the Boxer indemnity. America was instrumental in admitting to the Second Hague Conference the Central and South American states. But the United States would not be abandoning its time-honored position if it became sponsor of a new doctrine which is conformable to the law of facts. The question of voting power at The Hague, moreover, is in a somewhat different class from questions in which the United States has heretofore taken the side of the weaker states. As with man, so with states, suffrage is not a natural or inherent right. It comes only after compliance with rules established for its regulation. A man's vote represents himself and his family. There are physical limits to the influence and power which he may represent. A state, on the other hand, may be of almost any size and power. Yet with the present method of voting, no state is properly represented.

In the foregoing, the attempt has been made to do no more than state the prevailing theory of the equality of states; point out its most manifest defects; recount some of the remedies that have been suggested; make application of them to the organization of the Hague conferences; and suggest lines along which a reorganization might be made.

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# NEUTRALIZATION VERSUS IMPERIALISM

The article on "Neutralization" in the April number of the AMERICAN JOURNAL OF INTERNATIONAL LAW, written by a prominent member of the New England Anti-Imperialist League, seems to furnish additional evidence of the change of mind which has occurred in recent years among the advocates of the policy of anti-imperialism. They originally based themselves on a supposed universal principle, according to which all "peoples" were regarded as having a natural right of independence — it not being made clear by them what constitutes a "people," or how great a number of nations would result from the application of the doctrine, or how the great number of nations which would probably result would be able to get on together. The policy, or doctrine, based on this supposed principle has been called "nationalism," and the revolutionary and opposition parties in colonies and in incorporated regions which are seeking to be disincorporated now generally call themselves "nationalists." For some years after the Spanish war of 1898, the American advocates of anti-imperialism, acting in sympathy with the "nationalists" in the Philippines, demanded the immediate recognition by the United States of the independence of the Philippines and, with less emphasis, of Hawaii and Porto Rico. Confronted with the objection that to declare these islands independent would in all probability result in their falling into anarchy and barbarism, or in their being annexed as colonies by one of the great powers other than the United States, or in a war to prevent such annexation in which the United States would participate, the anti-imperialists, under the leadership of the League, changed their ground. Independence, or "nationality," was no longer regarded by them as a natural right of all "peoples" in the original strict sense; and an arrangement with respect to these islands called "neutralization," based largely on expediency, has for some time been advocated by them. The article in question may, therefore, perhaps not improperly be regarded as a statement in detail of the present position of the anti-imperialists.

"Neutralization," as explained by the writer of the article, would require that the United States should initiate and attempt to bring about an alliance between itself and the other great powers, by which the Philippines should be guaranteed against intervention except by mutual consent of all the allies and except as necessary to maintain a stable government, and against all interference of powers external to the alliance. This guaranty would operate whether the allied powers were at peace or were engaged in war.

Several objections at once present themselves to such a plan. It requires this nation to refrain from helping the Filipinos unless it can obtain the consent of other great powers, who at present have no right in the Philippines. It requires this nation to enter into a guaranty-alliance involving joint supervision by the allies over the Philippines, which might, under some circumstances, lead to a necessity for joint intervention. The author of the article suggests that the alliance maintain a "union navy" for this "police duty." This would of course necessitate the conversion of the alliance into a confederation or a federal union, of which the United States would be a part. Such an alliance would certainly come within the class of "entangling alliances" which it is the policy of this nation to avoid.

The author of the article does not confine himself to recommending such a guaranty-alliance with respect to the Philippines alone; he proposes that the plan be extended, on the initiative of this nation, so as to include not only all existing metropolitan nations and all of their existing colonies, but also all the "weaker peoples." Could this great scheme be put in operation, it is evident that the world would be divided into two great parties having opposite interests; in the one would be included the peoples inhabitating the national territory of the great allied guaranteeing powers, and in the other would be the "weaker peoples," who would be "neutralized," and subject to the supervision of a "joint navy" of the allied powers doing "police duty." Such a situation would, it would seem, clearly lead to one of two results: If the guaranteeing powers intervened among the "weaker peoples" for the keeping of order, there would probably arise a vicious form of attempted world empire; if they did not so intervene, the system would probably degenerate into one of widespread and progressive anarchy.

There seems, therefore, to be little hope for the improvement of present conditions along the path of "neutralization." The policy of nationalism pure and simple has been abandoned by the anti-imperialists because found to be indefensible, as tending toward anarchism or absolutism. The policy of opportunism is now unpopular everywhere, and is opposed to the American genius. It appears therefore to be worth while to inquire whether the solution of the problem of the relations which are to permanently exist between the United States and the annexed insular countries may not be found in some form of imperialism.

The anti-imperialist idea of imperialism is shown in the article to which reference has been made. The author of that article regards imperialism as a policy based on the principle of "ownership," and of rule over "subject-peoples." If imperialism were such a policy, it would be out of the question for this nation, as being opposed to the truth which this nation holds to be "self-evident," that "all men are created equal and are endowed by their Creator with certain unalienable rights." The doctrine of the spiritual equality of all men as the basis of some rights which are unalienable is the corner-stone of the American system, and any policy which is opposed to this equality must be rejected. But whatever views of imperialism may be held in some parts of the world which would justify the interpretation placed by the anti-imperialists upon the word imperialism, it has another aspect, which is the modern and American aspect, in which it is wholly consistent with American principles and American ideals.

The modern imperialism had its inception in the American Revolution. Great Britain insisted that she had plenary power over the colonies; the latter insisted that she had no power over them without their consent. There were men on both sides of the water who realized that both these doctrines were destructive of true political unity in the British Empire, and who, being desirous to preserve the then existing political unity of the Empire, were trying to find a *via media* between these extremes. Their work resulted in the development of a doctrine of imperialism according to which the British Empire was regarded as a federalistic political organism, of which Great Britain was the federal head. This plan was evolved by the efforts of John Dickinson in America and of William Pitt (Lord Chatham) in England. Washington and most of the moderate men in America sympathized with the idea, though they hesitated to commit themselves to it as a practical proposition under the circumstances then existing. Lord Chatham's bill, which was rejected instantly by the British House of Lords upon its introduction, and which was never introduced in the House of Commons, would have declared, if it had been enacted into law, that Great Britain's power in the Empire, exercised through the British Parliament, should only extend to "matters touching the general weal" of Great Britain and the colonies, which were "beyond the competency" of the government of a colony. Had the imperialism proposed by Lord Chatham been accepted, the American colonies would have been in some sense member-states of the British Empire, while Great Britain would have been at the same time a member-state of the Empire, and the federal head of the Empire. The British Government would have been both the state government of Great Britain and the federal government of the Empire.

Such a federalistic empire, it was then assumed, must be based on treaty between the member-states, negotiating on an assumed basis of equality, or on a continued process of arbitration within the empire, for the purpose of determining the extent of the power of Great Britain as the federal head to be exercised for the common purposes, and the extent of the power of the colonies as member-states to be exercised for local purposes. Burke opposed this policy. He declared that such a conception of empire was impossible, because it would either involve the entering into "a labyrinth of intricate and endless negotiations" or would "depend upon the juridical determination of perplexing questions" arising in the process of "the precise marking of the shadowy boundaries of a complex government." He also raised the objection that Great

Britain, as a member-state of a federalistic British Empire, could not justly act as the federal head, because in all or most disputes with the colonies Great Britain would be a judge in her own cause.

Burke, however, agreed with Samuel Adams, Dickinson, Lord Chatham, and many others in differentiating the power exercised by the Parliament of Great Britain in the Empire from the power exercised by it in Great Britain. The power exercised by the Parliament in the Empire they all agreed was a "superintending power," different in its nature from the strictly "legislative power" which it exercised in Great Britain.

The plan for federalizing the British Empire failed; but the idea of federalism lived. It was applied in one way when the United States were formed into a nation by the Constitution; and the conception of a British Empire federalized in the same way as the American Union, or in some way approximating that Union, never wholly died. After the American Revolution, and particularly after the federal union of the United States by the Constitution, it was inevitable that in all disagreements between Great Britain and her colonies there should have been a tendency on both sides to find a middle ground in a policy of federalistic imperialism. The dispute with Canada in 1841 was settled in the same way that it would have been had that policy been accepted; though Great Britain then maintained and still maintains her former position that as head of the British Empire she has, and of right ought to have, plenary power throughout the Empire.

The movement towards the atheistic, positivist, and individualist philosophy which swept the world after the French Revolution led to the acceptance in Great Britain of the dogma of universal nationalism and universal free trade. Adam Smith's doctrine, announced in 1776, that the world ought to be reorganized so that it should consist of a great number of independent nations trading freely with each other, was attempted to be put into practice; the policy of nationalism was widely accepted, and doctrinaires began to urge the recognition of all colonies as independent. It was soon realized, however, that colonies, if declared independent, would not necessarily adopt the doctrine of universal free trade, and when the policy of nationalism was seen to be associated with the policy of protection, its wisdom began to be doubted. However, Great Britain, during the period of its supremacy as a manufacturing center, inclined towards the policy of nationalism and anti-imperialism.

During the period from 1850 to 1870, the anti-imperialist sentiment in England was strong. It received its first check during the American civil war. The spectacle of a nation engaged in a struggle for the maintenance of its federal unity, coupled with the sudden stoppage of supplies to Great Britain, which might have been furnished by the colonies if a federalistic unity had been developed in the British Empire, caused British publicists, economists, and financiers to consider the possibilities which might result from a federalistic unity of the Empire. Thus, in the early days of the American civil war the federalistic imperialism which Dickinson and Lord Chatham had advocated in the American Revolution had its rebirth in the British Empire. A sentiment arose in favor of uniting the British Empire into a single political entity; and with the American Union so prominently in the foreground of the world's affairs, it was natural that the first plans for unifying the Empire should have contemplated the conversion of the British Empire into a federal union like the United States.

It was immediately seen, both in Great Britain and the colonies, that the American plan of union was not feasible for widely scattered countries; and that it was necessary that Great Britain should always remain the head of the Empire — her Executive and Legislature acting as the Government of the Empire. They therefore sought to bring about a unity of the British Empire by the application of the principle of federalism in some new way which should, perhaps, tend to approximate to the system of federalism applied in the United States, but which should be compatible with Great Britain remaining the head of the Empire. In 1862, the Saturday Review defined the new policy of imperialism as a policy of "continual approach on the part of England and her colonies to the realization of some idea of Federal Empire." The Times was inclined to doubt the possibility of applying the principle of federalism in any way in the British Empire, and to deprecate any policy which should not be based on a study of imperial precedents. In 1870, the Times said that those who were seeking to unify the Empire and make it permanent had two courses open to them — they must "either extract a principle of government from the precedents they find recorded at the Colonial Office, or throw over these principles and devise a system of federal government without an example in the history of our Empire."

In 1868, the Royal Colonial Institute was formed to counteract the anti-imperialist tendencies and to promote the unity and permanence of the Empire. This was a society for study, discussion, and sociability, composed of men from all parts of the Empire. After a very distinguished and successful career, in the course of which it has had great influence in promoting the unity of the Empire, the Institute still flourishes, housed in a fine building and possessing a large and valuable library of books relating to the British Empire and imperial subjects generally.

The movement for unifying the Empire continued to gather force, and in 1884 the Imperial Federation League was formed. This was a large organization, the object of which was "to secure by federation the permanent unity of the Empire." In 1886, the Marquis of Lorne, after his return from service as Governor-General of Canada, writing of imperial federation, declared that the League might do much good by its "assertion of the great principles of individual and corporate freedom leading to unity." In 1887, on the occasion of the Queen's Jubilee, the first conference of the premiers of the self-governing colonies was held in London, largely as a result of the imperial federation movement. The subject of imperial federation or imperial unity was not discussed at this conference, its deliberations being confined to questions of communication and defense within the Empire. Nevertheless, Lord Salisbury went so far as to say on this occasion that the aspirations and theories of those who were interested in the imperial federation movement were "nebulous matter that in the course of ages — in much less than ages — will cool down and condense into material from which many practical and business-like resolutions may very likely come."

The discussion which had occurred up to this time had shown that the plan for federating the British Empire in the same way as the United States was unsatisfactory alike to Great Britain and the colonies. Great Britain would not agree to it, because the historic British Parliament, which for six centuries had stood at the head of the British Empire, would have become the Parliament of the State of Great Britain, and there would have been a Parliament of the Empire, composed of representatives of Great Britain and the colonies, which would have been supreme over the British Parliament for the common purposes of the Empire. Mr. Freeman, the great student of federalism, in 1892, wrote:

> I am no lover of "empire;" I am not anxious for my country to exercise lordship over other lands, English-speaking or otherwise. But I will not, so far as one man can hinder it, have my country ruled over by any other power, even by a power in which my country itself has a voice. If it is proposed that the great and historic Assembly which King Edward called into existence in 1295 shall keep its six hundredth anniversary by sinking to the level of the legislature of a canton of a Britannic confederation, then I shall be driven, however much against the grain, to turn Jingo and sing "Rule, Britannia."

There was much division of sentiment in the colonies concerning imperial federation on American principles, but it seems that the general sentiment was unfavorable to it. The extremists and nationalists held out for independence; the conservative and unionist element doubted whether an assembly representing a number of widely scattered countries, acting by majority vote, might not often enact legislation which would be injurious to the minority, even though attempting to exercise, with the best intentions, a power limited to legislation for the common interests. It was realized that the condition of mutual knowledge of each other's circumstances, which is the prime requisite to just action of an assembly by majority vote, would be lacking in such an assembly, since the wide separation of colonies from each other and from the metropolitan nation makes it impossible for the representatives of each to know the circumstances of the others; and it was evident that to establish a legislative assembly for the common purposes which could act only by unanimous vote would probably result in nothing being agreed upon. A consideration which appealed alike to Great Britain and the colonies was that India, being without self-government, could not be brought into a federal organism on the American plan. A further though less serious objection made by some critics was that the isolated minor countries of the British Empire could not be brought into a strictly federal system.

As time went on it became more and more evident that if the plan of federation on the American basis were to be given up, it was impossible to reach any general agreement upon a plan for federating the Empire. Freeman said that empire and federation were irreconcilable ideas; that what was federal could not be imperial, and *vice versa*. This was true, taking the word "federal" in its literal sense, as meaning "arising from treaty;" but it only followed from this proposition that the British Empire could never be a "federal" organism, in the sense of an organism arising from treaty. It did not follow that the British Empire, or any other empire composed of a nation and its colonies, might not be a federalistic organism — that is, an organism having some of the characteristics of a federal organism. It came gradually to be recognized that the working out of a system of federalistic imperialism was to be a slow and difficult matter, which must be left to publicists and statemen. As a result, the movement for federating the British Empire on the model of the American Union died, and the Imperial Federation League was dissolved in 1893.

In 1897, on the occasion of the second Queen's Jubilee, a second conference of the premiers of the self-governing colonies was held in London, at which Mr. Chamberlain, Secretary of State for the Colonies, in his opening speech, said:

> The idea of federation is in the air. Whether with you it has gone as far it is for you to say, and it is also for you to say whether we can give any practical application to the principle.

The premiers decided, with two dissenting votes, that "the present political relations between the United Kingdom and the self-governing colonies are generally satisfactory under the existing condition of things."

While the imperial federation movement was going on, the Irish

Question was brought to a head by the introduction of Mr. Gladstone's Irish home-rule bills of 1886 and 1893. During the resulting discussion, the distinction between a country contiguous or adjacent to a nation — which can be justly and equally represented in the government of the nation — and countries separated by a great expanse of land or water from the nation — which can never be justly and equally represented in the government of the nation — was brought to the attention of the people of the British Empire and the world in general. Ireland, since 1800, had been fully incorporated into the British nation, and was justly and equally represented in the Parliament of the United Kingdom. A party in Ireland demanded that Ireland be disincorporated and recognized as a colony of Great Britain, standing in the same relation to Great Britain that Canada held to the United Kingdom. Mr. Gladstone's two Irish home-rule bills had for their purpose this disincorporation and recognition of Ireland as a colony of Great Britain. Both bills failed, it having been decided by a clear preponderance of the public sentiment in the United Kingdom that colonial self-government in such a case was impracticable. The self-preservation of the nation was, upon discussion, found to necessitate the incorporation of contiguous or adjacent countries into the body-politic of the nation where incorporation was possible, or the exercise of plenary power over them where incorporation was impossible or during the period prior to incorporation. The *status quo* was therefore maintained; and the principle was established that contiguous or adjacent regions are to be regarded as subject to a régime of assimilation and to incorporation by the metropolitan nation, and as subject to its plenary power prior to incorporation to the extent necessary to its self-preservation, of which extent it is to judge subject to international accountability; and that those countries only are to be considered as colonies which are so separated by land or water from the metropolitan nation that they can never be justly and equally represented in the government of the nation.

On the continent of Europe considerable progress was made during the years from 1870 to 1898 in determining the principles of imperialism. The establishment in 1871 of a united Germany, in which Prussia was the hegemonic state, had shown the possibility of a federalism which could be practically applied in cases where one of the member-states of a federal union overshadowed the others. The acquisition by Germany of Alsace-Lorraine, followed a few years later by the acquisition of colonies in Africa, led to study by German scholars of the relations between nations and their annexed contiguous and distant territory, as the result of which the relationship between Germany and Alsace-Lorraine was differentiated from the relationship between Germany and her colonies. Alsace-Lorraine was designated as *Reichsland* — that is, land under the plenary power of Germany destined to be assimilated with and incorporated into Germany; and the colonies as *Schutzgebiete* — that is, territory which has a distinct political entity, under the protection and dominion of Germany. As a result of this study also German scholars differentiated and to some extent defined the power of a nation exercised within itself, as distinguished from the power exercised by a nation externally to itself over territory and countries under its jurisdiction. They showed that in the latter case the power of the nation as a political unit is projected upon and over external and distinct political units. This difference had been recognized, as has been said, during the discussion growing out of the dispute between Great Britain and the American colonies, and the power exercised by the Parliament of Great Britain in the Empire had been called the "superintending power," as distinguished from the strictly legislative power exercised by the Parliament within Great Britain.

Influenced, perhaps, by this differentiation between the power of the nation exercised internally and its power exercised externally in the empire, the French National Colonial Congress, held at Paris in 1889, recommended that the power of the government of the French nation in the empire should be exercised by the advice of a special council composed of men familiar with colonial affairs and imperial policy, which was to keep in touch with local councils of the same nature in each colony advisory to the local government. Soon afterwards the *Conseil Supérieur des Colonies* was remodeled in France and the *Kolonialrath* established in Germany — the old council system of the seventeenth and eighteenth centuries being thus rehabilitated and developed. Largely also by the action of the French National Colonial Congress in recognizing the difference between the power of a nation exercised internally and its power exercised externally in its empire, the management of the relations between France and its colonies was placed in the charge of a Secretary for Colonial Affairs.

On the continent of Europe, however, the federalistic conception of empire was not accepted. The International Colonial Congress, held at Paris in 1889, recognized the policy of assubjectization as equally permissible with the policy of assimilation and the policy of autonomy. Nor did the Congress attempt to define the cases to which a régime of assimilation was applicable or to distinguish them from the cases in which a régime of autonomy was applicable. The idea of the Congress seemed to be that the normal imperial policy was that which, regarding the colonies as an extension of the soil of the metropolitan nation, looked toward the "benevolent assimilation" of them by applying to them all the institutions and customs of the metropolitan nation which they could be induced to adopt without extreme force; that an exceptional régime of autonomy was to be allowed in the case of those colonies which refused to submit to assimilation and threatened to revolt if not permitted to have self-government; and that an exceptional régime of assubjectization was allowable as respects those backward peoples which refused either to be assimilated or to attempt to revolt. The Congress no doubt reflected the political views of Europe concerning imperialism at that time. There was no altruism in continental politics, and hence there could be none in the International Colonial Congress.

Nor was the federalistic conception of empire which was beginning to arise in Great Britain and the British Empire based on any belief of the British people, collectively considered, in political altruism. Imperial federation in any form was regarded as applicable only to Great Britain and those colonies in which English settlers formed the bulk of the population, and which had developed self-government by their own internal energy and insistence. The possibility of educating the people of the colonies in which the native inhabitants formed the bulk of the population so as to fit them for self-government, though suggested by British writers, seems not to have made any impression on the collective mind of Great Britain. Much less was the furnishing of such a political education regarded in Great Britain as the duty of the metropolitan nation. British colonial administration was devoted to the economic development of the colonies and to securing the individual rights of both the British and native inhabitants through just and expert administrative officials and through a learned and incorruptible judiciary. Education of native peoples in self-government, if not disapproved, was not aided. The prime purpose of imperial policy was considered to be the fostering of the trade of the Empire, and the only imperial federation desired was a federation of the colonies which were of British blood. Had such an imperial federation been accomplished, the colonies of non-British blood would have been placed in a lower class, and there would have resulted a kind of *imperium in imperio.*

Such was the condition of imperialist thought in 1898, when, by the acquisition of Hawaii, the Philippines, and Porto Rico, this country was required to determine its relations with annexed countries situated at so great a distance that they could never be justly and equally represented in the American Government, and which were therefore, according to accepted definition, colonies of the United States. It was inevitable that the United States, when once definitely committed to a policy of imperialism, should evolve an empire in which the principle of federalism should be applied to the fullest extent possible. Standing as the great exponent of federalism, and thoroughly convinced of the justice of the principle, this country did not need any impetus from abroad in this direction, and we took no heed of the policy of other nations. It is probable that even the imperial federation movement in Great Britain had no effect upon the formation of our imperial policy. In these last years, however, now that we have evolved a federalistic imperial policy, which, as will be shown, differs materially from that of any other nation in having a strong and definite altruistic character, we are inclined to look abroad for the purpose of developing it by comparison with that of other nations. As a result of this comparison we are beginning to appreciate that there is much to be learned from the thought and experience of Great Britain and the nations of Continental Europe, even though we are leading them towards a new and higher conception of empire which they have heretofore not perceived or have dismissed as impracticable and utopian.

The United States in 1898 had had no experience in the management of colonies. All annexations by the United States previous to 1898 had been of contiguous territory, excepting in the case of Alaska, and that country had continued to be so sparsely settled that the question of its relations with the United States did not press for solution. The contiguous territory had been regarded as being inchoately a part of the body-politic of the American nation, and had been administered by the nation, prior to its incorporation, with a view of admitting the countries organized within the annexed territory as member-states of the Union. It was recognized by the action of Congress and the Executive, and by the decisions of the Supreme Court, that the National Government of the United States exercised, and of right ought to exercise, plenary power for political purposes over this contiguous territory during its preparation for incorporation — individual rights being secured by the general prohibitions of the Constitution denying to the Federal Government the exercise of power anywhere in violation of such rights.

The purpose of the American Government towards the colonies was from the outset to perform the duties towards them which an enlightened altruism and an enlightened self-interest demanded. It is true that in the instructions of President McKinley to the Secretary of War, of December 21, 1898, it was declared that the mission of the United States was one of "benevolent assimilation;" but it must be pointed out that this statement is open to criticism only as applied to distant annexed regions, which can never be justly and equally represented in the Government of the nation, and that it is correct and appropriate as applied to contiguous annexed regions. It is not surprising, all things considered, that this distinction should not have been appreciated at that time. The use which the anti-imperialists have made of this statement is by no means justified by the context. In the instructions it was said that the inhabitants of the Philippines were to be assured "that full measure of individual rights and liberties which is the heritage of free peoples;" and that "good and stable government" was to be bestowed "upon the people of the Philippine Islands under the free flag of the United States." In President McKinley's message of December 5, 1899, the purpose of the United States towards the Philippines was thus declared:

> We shall make these people whom Providence has brought within our jurisdiction feel that it is their liberty and not our power, their welfare and not our gain, we are seeking to enhance. Our flag has never waved over any community but in blessing. I believe the Filipinos will soon recognize the fact that it has not lost its gift of benediction in its world-wide journey to their shores.

In President McKinley's message of December 3, 1900, the instructions of the President to the second Philippine Commission, headed by Mr. Taft, were quoted. In these instructions, the following rule was prescribed:

> In all the forms of government and administrative provisions which they are authorized to prescribe, the Commission should bear in mind that the government which they are establishing is designed not for our satisfaction, or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands; and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government. * * *
>
> The many different degrees of civilization and varieties of custom and capacity among the people of the different islands preclude any definite instruction as to the part which the people shall take in the selection of their own officers; but these general rules are to be observed: That in all cases the municipal officers, who administer the local affairs of the people, are to be selected by the people; and that wherever officers of more extended jurisdiction are to be selected in any way, natives of the islands are to be preferred, and if they can be found competent and willing to perform the duties they are to receive the offices in preference to any others.

These instructions recognized that the general principle of federalism was to be applied throughout all regions under American jurisdiction by providing for the application of federal principles in the government of the Philippines. The paragraph on this subject read:

> In the distribution of powers among the governments organized by the Commission, the presumption is always to be in favor of the smaller subdivision, so that all the powers which can be properly exercised by the municipal government shall be vested in that government, and all the powers of a more general character which can be exercised by the departmental government shall be vested in that government, and so that in the governmental system which is the result of the process the central government of the islands, following the example of the distribution of the powers between the States and the National Government of the United States, shall have no direct administration except of matters of purely general concern, and shall have only such supervision and control over local government as may be necessary to secure and enforce faithful and efficient administration by local officers.

In the report of the second Philippine Commission transmitted to the President November 21, 1901, the conception of the purpose of the American administration in the Philippines as a purpose to educate the natives of the islands in self-government, so that the Philippine Archipelago might ultimately become a self-governing colony of the American empire, like Canada in its relation to the metropolitan nation, but unlike Canada in being under the self-government of its native peoples, was carefully brought out. In that report it was said:

> We have thought that by establishing a form of municipal government practically autonomous, with a limited electorate, and by subjecting its operations to the scrutiny and criticism of a provincial government in which the controlling element is American, we could gradually teach them the method of carrying on government according to American ideas. In the provincial government Filipinos are associated intimately with Americans, and in the central government the same thing is true. As the government proceeds the association in actual government will certainly form a nucleus of Filipinos, earnest, intelligent, patriotic, who will become familiar with practical free government and civil liberty. This saving remnant will grow as the years go on and in it will be the hope of this people.

President Roosevelt, in his first message to Congress on December 5, 1901, vitalized and rendered permanent the sagaciously altruistic conception of empire which had been evolved by President McKinley, by his Secretary of War, Mr. Root, and by the Commission headed by Mr. Taft, at the same time showing its full significance in its relation to the imperial policy of the rest of the world. In that message, he thus stated the principle upon which American imperial policy was to be based, and described the manner in which we were to apply that principle in our relations with the Philippines:

> To be permanently effective, aid must always take the form of helping a man to help himself; and we can all best help ourselves by joining together in the work that is of common interest to all. * * *
>
> In dealing with the Philippine people we must show both patience and strength, forbearance and steadfast resolution. Our aim is high. We do not desire to do for the islanders merely what has elsewhere been done for tropic peoples by even the best foreign governments. We hope to do for them what has never before been done for any people of the Tropics — to make them fit for self-government after the fashion of the really free nations.

This announcement of President Roosevelt evidenced that this nation committed itself to a new policy of imperialism, which though proceeding along the lines of the most enlightened imperial policy then existing in the world, and carrying forward that policy to its logical and final outcome, was adopted without reference to the policy of other nations as an inevitable development from American principles. This American imperialism was declared to be not a policy of imperial federation between this country and those of its annexed countries in which the population was of American blood or in which American blood was able to dominate, but a policy of raising up and developing peoples of alien blood and alien institutions, educating them in self-government, and assisting them in forming themselves into states of an American empire, of which the United States should be the head, and which should be held together not by force but by the bonds of interest and amity.

This announcement of President Roosevelt was made shortly after the Supreme Court of the United States had recognized that the relations between the United States and the insular countries were the relations between a nation and its colonies. According to our system, the Supreme Court, in order to decide cases involving the constitutional rights of individuals which are guaranteed by the Constitution of the United States, finds it necessary at times to determine the nature of the relation between the United States and its annexed territory. Inasmuch as the jurisdiction of the Federal courts extends to all cases arising under the Constitution of the United States and acts of Congress, any person claiming to be aggrieved by the action of Congress, or by Executive action under the Constitution or an act of Congress, affecting individual action in or with relation to annexed regions, may raise the question of the power of Congress or the President over any annexed region. Prior to 1901, the only cases which had arisen in the Supreme Court involving the power of the United States over its annexed territory had related wholly to its power over contiguous annexed territory which was practically uninhabited. Such territory was inevitably destined, from strategical necessity growing out of the national duty of self-preservation, and from the mutual interest of the nation and the people of the territory, to be incorporated, after a preparatory régime of assimilation, into the Union as member-states. The Supreme Court had in a long course of decisions recognized the power of the Congress, and of the President by the authority or subject to the disapproval of Congress, to create or alter governments in annexed territory, and generally to exercise plenary power over such territory for purely political purposes. Thus, the Supreme Court had differentiated the power exercised by this nation externally, through the Congress, the President, and the Supreme Court, over territory and countries within its jurisdiction, from the limited power exercised by Congress, the President, and the Supreme Court within the nation under the Constitution of the United States. The only limitation recognized by the Supreme Court upon the power of the nation wielded externally by the Congress, or by the President under the authority of Congress or subject to its disapproval, was a limitation in favor of the rights of the individual to life, liberty, and property, which are recognized and secured by the Constitution of the United States throughout all places under American jurisdiction. As a part of the régime of assimilation applied to the contiguous annexed territory of the United States, the Constitution of the United States had been "extended" by act of Congress over the inchoate States, called "Territories," which had been organized by act of Congress out of the contiguous annexed territory.

This "extension" of the Constitution was not regarded by the Supreme Court as affecting the plenary power of Congress over matters purely political in these organized Territories. Under the late decisions of the court, the effect of "extension" of the Constitution seems to be to put in force, in the organized Territory to which the Constitution is "extended," all the provisions of the Constitution which protect the rights of the individual against governmental action, in exactly the words of the Constitution and in exactly the same sense that those words have within the States of the Union.

The treaty with Spain left the relations between the United States and the ceded countries in the situation in which they were by international law and usage. The Insular Cases presented to the Supreme Court the question in what manner and on what principle the courts were to secure and protect the rights of individuals to life, liberty, and property, in actions growing out of transactions in or with relation to the conquered and ceded countries, whether contiguous or distant, and whether of American or alien blood, before Congress or the President had promulgated a bill of rights for these countries or had given them the United States bill of rights by "extension" of the Constitution. The Supreme Court decided that, from the moment of conquest or cession, the rights of individuals to life, liberty, and property were to be protected by the courts from governmental action in or relating to the conquered or ceded countries on the principle that all the applicable provisions of the Constitution were in force in those countries from the instant of conquest or cession, the Supreme Court determining what provisions of the Constitution were applicable in each case. Thus, a rule was established which enabled the courts at all times to protect the rights of individuals throughout the empire, and which was sufficiently flexible to enable the Supreme Court to do justice in all cases.

The administration of the Philippines has been conducted under the direction of Mr. Root and later of Mr. Taft, as Secretary of War, according to the policy announced in President Roosevelt's message of 1901. It has been the purpose to educate the people of the Philippines as rapidly as possible, not merely in an economic way, and in the arts and sciences, though this has been one of the prime objects of the administration, but particularly in a political way; the political education being, however, essentially practical, and such theory being taught as is necessary to explain the practice. In municipal affairs the native inhabitants have been given almost entire control in all cases where this has been possible. While assistance has been given to them in the management of these affairs, and a supervision has been exercised for the purpose of preventing fraud and dishonesty, they have not only been allowed to manage their affairs honestly as they saw fit, but have been encouraged and protected in so doing. In the departmental divisions of the Philippines, corresponding in a general way to the States which it is hoped may subsequently be developed and may form themselves into a United States of the Philippine Islands under the headship of the United States of America, the native inhabitants have been given every opportunity to hold office which was possible and have been actually placed in positions of responsibility to the fullest extent which has been deemed compatible with good government. In the central government of the Philippine Islands several of the highly educated native inhabitants have already taken a very distinguished part, and the recent establishment of a Lower House of the General Assembly of the Philippine Islands, elected by a native electorate, marks, it is hoped, the beginning of a Central Government of the Philippine Islands which shall ultimately be controlled by the native inhabitants and be in the same relation to the Government of the United States as is the Government of Canada to the Government of the United Kingdom.

This federalistic and altruistic imperialism which has been adopted as the American policy throughout the American empire is entirely different from the old imperialism. That proceeded on the basis that the metropolitan nation was the source of all political power in the colonies. This regards the colonies as states having inherent rights to their own political life to the extent that their activity does not interfere with the federalistic unity of the whole empire. Thus, modern imperialism, so far from being opposed to representative and republican institutions, proceeds upon the theory that the right to such institutions is universal to the fullest extent possible, and that they are therefore to be extended throughout the empire. The metropolitan nation is to extend its own representative and republican institutions under its own Constitution by incorporating into its body-politic such contiguous lands and communities as it deems best, after preparing them for participation in its inner life. The colonies, which are so distant that they can never be incorporated in this body-politic, it protects and develops into self-governing states as rapidly as possible, having for its ultimate object the evolution of a federalistic empire composed of itself and a body of self-governing states, connected and united by bonds of interest and amity, of which empire it shall be the representative and head.

This new federalistic empire is, as has been said, based on different principles from those which govern a strict federal union like the United States. There are several important questions regarding the organization of such an empire which have been discussed and in answer to which it is possible now to state with some confidence the principles on which this new form of political organism is to proceed.

The first of these questions is, How are Congress and the President to exercise the power of the nation over the colonies, and what is to be the relation of each to the other in exercising this power?

The answer seems not to be difficult when the difference between the power of a nation exercised within itself and the power exercised by it externally over its colonies is considered. When the government of a nation acts internally, it exercises a power which is partly legislative, partly executive, and partly judicial. The principle of "distribution of powers" applies, and the three functions of government are placed in different hands. When the government of a nation acts externally over the colonies, it wields the power of the nation as a unit over other political units, in a way somewhat similar to that in which it acts when it exercises the treaty-making power or the war power: the power exercised by the nation is essentially one of superintendence for the purpose of standardizing the political units constituting the empire and unifying them, which necessitates investigation and adjudication concerning political objects external to the nation. The exercise of this power results in acts of the government of the nation which have the effect of legislative, executive, and judicial acts in the colonies, but the superintending power exercised by a nation in its empire is as indivisible in its nature as the treaty-making power or the war power. Whenever power is exercised by two persons non-concurrently, either one must act and the other advise, or one must act in the first instance and the other in the final instance with power to overrule and supersede. In the latter case, the one first acting is bound by all the previous rulings of the other, and his action may be modified, overruled, or superseded by the other. The experience of all nations in the management of the relations with their colonies points to the latter arrangement being the proper one to apply to such a case. The executive of the nation acts in the first instance, being bound by all the rulings of the legislature, and his action is subject to be modified, overruled, and in some cases to be superseded by the action of the legislature. This principle has been recognized by Congress and the Supreme Court. Congress has authorized the President to exercise all political powers over annexed territory, and the Supreme Court has upheld its action. If the power of Congress over such territory were strict legislative power, it could not delegate the power. It is not settled by the Supreme Court whether the President exercises power over the colonies wholly by delegation of Congress. The latest intimation of the opinion of the court is that he may exercise civil power without authority of Congress, in cases of new acquisitions, though of course in this case, as in all others, the action of Congress when taken, and the precedents established by Congress and the Supreme Court in other cases, bind the President. Thus, there is no danger of the President becoming an "emperor." The imperialism of the present day leaves the legislature of the metropolitan nation as the final tribunal and arbiter of the empire, controlling by its decision the executive. Any exercise by the President of the power of the nation over the colonies is as an official or tribunal of first instance; so that he exercises this power under the authority or subject to the disapproval of Congress, and subject also to its power to modify, overrule, or supersede his action.

The advantage in having the President exercise the power of the nation over the colonies in the first instance is that the Executive Departments of the Government can usually act more effectively in matters which require an investigation of facts external to the United States than can the Congress; and while Congress must, in matters of great importance, make such investigations and adjudicate and finally determine the great questions arising in the course of our relations with our colonies, the power of the nation over the colonies will, it would seem, probably be most justly exercised if the President exercises it in the first instance in all matters not of great importance, and Congress confines itself to supervising his action and determining questions of great importance.

Another question which has been much discussed is, How are the powers of the metropolitan nation in its empire, regarding the empire as federalistic, to be legally limited?

The difficulty with every federalistic conception of empire is to find some principle by which the powers of the metropolitan nation in the empire may be legally limited. It is productive only of confusion to speak of an organism as federal or even federalistic, when as a matter of fact the limitations upon the power of the central government are in their last analysis only self-limitations. Three theories have been suggested concerning the basis upon which the limitation of the powers of a metropolitan nation in its empire may be regarded as legally limited. The first is the theory of the Supreme Court of the United States, that the power of the Congress of the United States over the colonies is limited by all the "applicable provisions" of the Constitution of the United States. This theory furnishes a basis for legal limitations upon governmental power as respects individuals, and enables the courts to protect the rights of the individual in cases arising in or with relation to the colonies; but it seems to afford no basis for legal limitations upon the purely political powers of the metropolitan nation and the colonies. The Supreme Court can determine what provisions of the Constitution are applicable in cases involving the rights of individuals; but even though all concerned agree that the relations between the United States and the colonies are to be determined by applying the applicable provisions of the Constitution of the United States, there is still lacking a basis on which to decide the question of applicability in those purely political disputes which are outside the jurisdiction of the Supreme Court. Another theory of the manner in which the powers of a metropolitan nation in its empire are limited is that these limitations are under an unwritten constitution theoretically established by all the people of the empire, but actually not existent except as formulated by the act of imperial conferences, by imperial arbitrations, and by imperial legislation. But this is indefinite, and all limitations of this kind would seem to be in their last analysis self-limitations. A third and perhaps the most reasonable theory is that the powers of a metropolitan nation in its empire are limited by an imperial law common to all empires, nations, states, and colonies, which is based, like international law, on the common juridical sentiment of the civilized world and upon the actual policy and practice of civilized nations.

The supposition of the existence of such an imperial law seems at first sight violent, but it is a less difficult conception than was that of international law in the time of Grotius. Anyone who attempts to study the relations between nations and colonies or the methods of colonial administration immediately finds it necessary to study the theory and practice of all nations and all colonies, because the necessities of the situation are in a general way the same in the case of one nation and its colonies as in the case of all other nations and their colonies. It is true that there will probably always be disputes arising between nations and their colonies which can not be settled by the application of known principles; but the same is true concerning disputes of nations with other nations, and yet this is not considered to militate against the existence of international law. The supposition of an imperial law makes it possible to understand the tendency toward the solution by imperial conference and imperial arbitration of questions arising in the course of the relations between Great Britain and its colonies. According to the federalistic conception of empire, the relations between the member-states of the empire have an international aspect, and these relations are properly settled by conference between the states within the empire, or, in case of failure of the conference to agree unanimously, by arbitration within the empire. Conference or arbitration supposes the existence of a law by which the political units who join in the conference or who submit to arbitration recognize themselves to be bound.

The supposition of an imperial law determining the relations between nations and their colonies is opposed to any conception of world empire. It is essential to the conception of such an imperial law that there should always exist several empires, as well as nations without colonies, by whose theory and practice the principles of such a law would be determined.

On the theory of a federalistic empire under imperial law, non-self-governing or partially self-governing colonies are regarded as states of the empire equally with self-governing colonies, and are entitled to participate in imperial conferences and to submit their questions to imperial arbitration. Officials appointed by the United States to participate in the local government of colonies are not in the position of rulers of the colony, but of substitutes for citizens of the colonies in the offices held by them; and such substitution is to last only so long as necessary in order that there may be a just and stable local government.

It seems, therefore, that in the federalistic American empire formed of the United States as metropolitan nation and the insular countries as member-states, it is possible to find, in this imperial law, if recognized and acted upon, a basis for legal limitations upon the powers of the United States when exercising power for the common purposes of the empire, and upon the powers of the insular countries when exercising power for local purposes.

Another question which is beginning to be discussed is, How shall the exercise of the power of the metropolitan nation in its empire, by the legislature, and by the executive with the authority or subject to the disapproval of the legislature, be safeguarded?

The first safeguard would seem to be the recognition by the legislature and the executive of the nation and by the people of the nation and of the empire, that all imperial matters are regulated by imperial law. By such a recognition, all danger of absolutism in the empire may, it would seem, be avoided. Every act of the metropolitan nation or of the colonies would thus be judged of by the nation, by the colonies, and by the world at large as an act of jurisdiction, and the relations of the different parts of the empire would be based upon justice, reason, and mutual interest.

A second safeguard would be the establishment of a department of imperial affairs in the executive government of the nation. Assuming that the relations between a nation and its colonies are under imperial law and that those between it and other nations are under international law, it results that the affairs of nations having colonies fall into three great classes — internal affairs, imperial affairs, and foreign affairs. To imperial affairs, therefore, it would seem that the separate secretariat should be appropriated.

A third safeguard would be the establishment of special councils in the metropolitan nation, advisory to the executive and legislature, composed of men who are familiar with the local circumstances of the colonies and with the history, the principles, and the practice of imperial government, whose advice might be taken on proposed governmental action, and from whom investigating boards for imperial purposes and tribunals of imperial arbitration might be selected. This method of safeguarding the action of the executive and legislature, when either is exercising the power of the nation in the empire, is already adopted to a greater or less extent in the British and European empires.

A fourth safeguard would be the institution of imperial conferences, at which commissioners of the nation, together with its secretary for imperial affairs, may confer with commissioners of the colonies for the purpose of reaching by agreement a decision of complicated and difficult questions arising in the empire or growing out of the relations between the empire and the rest of the world. By the action of the imperial conference of the British Empire held at London in 1907, imperial conferences at regular periods were recognized as a part of the government of the Empire.

A fifth safeguard is the institution, within the nation, of tribunals of imperial arbitration, by whose decisions upon imperial questions the nation and the colonies will hold themselves to be bound, but who would not be called upon to act except when imperial conferences failed to agree unanimously.

With these various safeguards thrown about the exercise of power in the empire by the Congress and the President of the United States, and with the additional safeguard for the life, liberty, and property of the individual given through the exercise by the Supreme Court of jurisdiction throughout the American empire in all cases in which these rights are claimed to be violated, it seems that no danger to the institutions of the country is to be feared. The system of federalistic imperialism which has been outlined above preserves all the American principles — the principle of political unity throughout the regions under American jurisdiction, with states' rights universally recognized and protected; the principle of governmental power universally limited by a supreme law, with these limitations enforced by adequate safeguards; and the principle of protection by the courts of the individual's fundamental rights against the Government.

Another question which is becoming serious in the British Empire and may very likely become serious in the American empire is, What are the rights of commerce and intercourse between the different states of the empire, growing out of the imperial citizenship which follows from the recognition of the federalistic unity of the empire?

In answer to this, it is to be considered that the federalistic empire of the future is probably to vary from the federally united political organisms like the United States in the direction of internationalism. That is to say, the powers exercised by the United States for the common purposes of the empire and the powers exercised by the colonies within themselves are probably always to have somewhat the aspect that they would have if the United States and its colonies were an alliance and the United States were the leader of the alliance. Somewhere in the direction of federal union, between the two extremes of alliance and strict unity, the line is to be drawn by which the details of government in the empire will be determined. Imperial citizenship probably will not, therefore, carry with it the same rights of unrestricted commerce and intercourse within the empire that citizenship of the United States carries within the American Union. The relations between the different states of the empire and the relations of each state with the metropolitan nation will doubtless always have an aspect somewhat international. The inhabitants of each colony, as a state of the empire, will no doubt be recognized as having an imperial citizenship by virtue of their state citizenship, which will carry some rights in each other state of the empire different from those which they would enjoy in a foreign nation. But each colony, as a state of the empire, must be permitted to exercise such rights as are properly necessary for its self-preservation and for the highest development of itself, the empire, and the world at large; and therefore each colony must, it would seem, be permitted, within limits, and subject to the control of imperial conference and imperial arbitration, to regulate not only its commerce but also its intercourse with the other parts of the empire, even perhaps in extreme cases to the point of prohibiting such trade and immigration proceeding from within the empire itself as is incompatible with the self-preservation of the colony.

Another and most important question which suggests itself is, How are all parts of an empire justly to contribute the funds which it is necessary for the metropolitan nation to use for the common defense and welfare of the empire?

The conception of a federalistic empire negates the idea of a common congress or parliament of the empire in which each state of the empire, and its population, are represented; hence, there can be no taxation for the common purposes of the empire. It also negates the idea of the metropolitan nation exploiting the colonies for its own benefit, and thus obtaining indirectly from the colonies the resources with which to pay the debts incurred by it for the common defense and welfare. In the federalistic empire, therefore, the money to meet the expenses incurred in the common defense and for the common welfare must be obtained by the contribution of the colonies. These contributions will naturally be determined by imperial conferences, or, on failure of the conferences to agree, by imperial arbitration.

The greatest expenses which the metropolitan nation will have to incur in the exercise of power for the common purposes of the states of the empire will no doubt be those arising from the defense of empire and from the establishing of communication between the different parts of the empire. The wide separation of the parts of the empire requires the maintenance of a large fleet for imperial defense and of cables and other modes of communication. To these expenses it seems clear that the colonies should contribute justly. But as some wars made by the nation may be aggressive, or may concern the metropolitan nation exclusively, it seems not impossible that, as the federalistic nature of the empire comes to be recognized, a rule of international law may be established permitting neutrality, in some cases, to a colony not contributing to the expenses of war waged by the nation, upon proper conditions.

From what has been said, it has, it is hoped, been made clear that imperialism is not a policy which implies "ownership" of peoples or "rule over subject-peoples," and that in the last three decades the character of imperial policy has so much changed that it may not be unreasonable to believe that the policy is evolving into a science. As there is a recognized science of international relations and another recognized science of the internal relations of nations and states, there may yet perhaps be recognized a science of imperial relations.

Unlike the policy of "neutralization," imperialism preserves the *status quo,* and involves no change in the existing relationships of the nations and states of the world; as an American policy it is wholly consistent with the permanent maintenance of the Monroe Doctrine. It does not imply extension of power by aggression; on the contrary, it accepts the existing situation as respects nations and their colonies, and seeks to ascertain the just principles applicable to the relationship, on the theory that the peace of nations and states, as of individuals, depends upon the establishment of just principles, which, by general recognition and adoption, determine the relations of each to the other. The empire thus established, in which individual rights, state rights, and republican institutions are secured and guaranteed to the fullest extent possible, has a benevolent purpose which might not exist in an alliance of great powers doing "police duty" over "neutralized" states.

As the simpler, juster, more practicable, and more useful policy, therefore, it seems that imperialism is to be preferred to "neutralization."

ALPHEUS HENRY SNOW.

# THE HISTORY OF THE DEPARTMENT OF STATE

## II

### THE CREATION OF THE DEPARTMENT OF STATE

Although the Constitution did not provide in terms for the creation of Executive Departments of the Government, it spoke of them as things which would be established as a matter of course. Article II, section 2, in treating of the powers of the President, said: "He may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices;" and further in the same section: "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, or in the courts of law, *or in the heads of Departments.*"

Under the old Government Congress had provided Departments of Finance and War, as well as Foreign Affairs, and in the Constitutional Convention it was shown that the framers had in mind the creation of more effective Executive Departments to take their place. Alexander Hamilton's plan of government contemplated a supreme executive "to have the sole appointment of the heads or chief officers of the Departments of Finance, War, and Foreign Affairs."[1] Oliver Ellsworth proposed that there be an executive council to consist of the President of the Senate, the Chief Justice, "and the ministers as they might be established for the department of foreign and domestic affairs, war, finance and marine, who shall advise but not conclude the President."[2] Gouverneur Morris of Pennsylvania, seconded by Charles Pinckney, of South Carolina, submitted the following:

> To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers — 1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U. S. as may in

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[1] Writings of Madison (Hunt), III, 195.

[2] *Ibid.*, IV, 234.

his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union: He shall be President of the Council in the absence of the President.

2. The Secretary of Domestic Affairs who shall be appointed by the President and hold his office during pleasure. It shall be his duty to attend to matters of general police, the State of Agriculture and Manufactures, the opening of roads and navigations, and the facilitating communications thro' the States; and he shall from time to time recommend such measures and establishments as may tend to promote those objects.

3. The Secretary of Commerce and Finance who shall be appointed by the President during pleasure. It shall be his duty to superintend all matters relating to the public finances, to prepare & report plans of revenue and for the regulation of Expenditures, and also to recommend such things as may in his Judgment promote the commercial interests of the U. S.

4. The Secretary of foreign affairs who shall also be appointed by the President during pleasure. It shall be his duty to correspond with all foreign Ministers, prepare plans of Treaties, & consider such as may be transmitted from abroad, and generally to attend to the interests of the U. S. in their connections with foreign powers.

5. The Secretary of War who shall also be appointed by the President during pleasure. It shall be his duty to superintend everything relating to the war Department, such as the raising and equipping of troops, the care of military stores, public fortifications, arsenals & the like — also in time of war to prepare and recommend plans of offence and Defence.

6. The Secretary of the Marine who shall also be appointed during pleasure — It shall be his duty to superintend every thing relating to the Marine Department, the public ships, Dock Yards, naval Stores & Arsenals — also in the time of War to prepare and recommend plans of offence and defence.

The President shall also appoint a Secretary of State to hold office during pleasure; who shall be Secretary to the Council of State, and also public Secretary to the President. It shall be his duty to prepare all Public dispatches from the President which he shall countersign.

The President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment, and either Conform to such opinions or not as he may think proper; and every officer above mentioned shall be responsible for his opinion on the affairs relating to this particular Department.

Each of the officers above mentioned shall be liable to impeachment & removal from office for neglect of duty malversation or corruption.[3]

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[3] Writings of Madison (Hunt), IV, 242.

While the proposition for a council of state was rejected, a part of the purpose which it was intended to serve was recognized in section 2, article 2 of the Constitution, which provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." Morris's motion and others looking to the same end show that the members of the convention entertained well-defined ideas of the division of the duties of executive government.

The first Congress under the Constitution obtained a quorum in both branches on April 6, 1789, when the electoral votes for President and Vice-President were counted. On April 30 George Washington was inaugurated and entered upon the duties of the Presidency, but as yet no executive machinery had been arranged. The attention of Congress had been engrossed by the question of providing revenue with which to run the new Government, and it was not until May 19 that the matter of creating Executive Departments was taken up.[4]

On that day Elias Boudinot, of New Jersey, formally brought it before the Committee of the Whole of the House of Representatives. "The great Executive Departments," he said, "which were in existence under the late Confederation, are now at an end, at least so far as not to be able to conduct the business of the United States." The Constitution, he continued, contemplated Executive Departments to aid the President. The finances of the Government required immediate attention. The old Departments could not be models for the new, because of the essential change which had taken place in the Government. He preferred that provision be made first for a Department of Finance, the head of which should be termed "the Secretary of Finance," and after that to proceed to the consideration of the War Department and Department of Foreign Affairs.

Egbert Benson, of New York, moved that three Departments be established "in aid of the Chief Magistrate," to be "severally denominated the Department of Foreign Affairs, Treasury, and War." John Vining, of Delaware, thought there should be added a Home

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[4] Annals of Cong., 1st Cong., vol. 1, p. 368 *et seq.*

Department to deal with the territorial possessions and domestic affairs of the country. After further debate James Madison offered as a substitute for the several motions before the committee the following:

> That there shall be established an Executive Department, to be denominated the Department of Foreign Affairs, at the head of which there shall be an officer, to be called the Secretary to the Department of Foreign Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President.
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> That there shall be a Treasury Department, &c.
>
> That there shall be a War Department, &c.

Vining at once proposed to add a "Domestic Department," but presently withdrew the motion for the time being. Samuel Livermore, of Massachusetts, objected to the Department of Foreign Affairs being placed at the head of the list. He thought the Treasury Department was the most important and should go first. The committee, however, accepted Madison's motion; but when it took up the matter of the appointment and removal of the Secretary an interesting debate arose.

William Smith, of South Carolina, thought it unnecessary to prescribe that the Secretary of Foreign Affairs should be appointed "by the President, by and with the advice and consent of the Senate," as the Constitution already prescribed this mode, and the clause concerning removability was objectionable because it conferred the power of removal upon the President alone. On his motion the clause relative to the mode of appointment was struck out. Smith then said he doubted if the Secretary could be removed by the President. Being once in office he must remain until death or conviction upon impeachment. Jackson, of Georgia, proposed that the President be given power to suspend the Secretary after his impeachment by the Senate, but thought his removal required his conviction upon impeachment by the Senate. Boudinot replied:

> The gentlemen who denied the power of the President to remove from office founded their opinion upon the fourth section of the second article of the Constitution, where it declared that all officers shall be removed from office on impeachment for, and on conviction of, treason or bribery.

If their construction is admissible, and no officer whatever is to be removed in any other way than by impeachment, we shall be in a deplorable situation indeed. Consider the extent of the United States, and the difficulty of conducting a prosecution against an officer, who, with the witnesses, resides a thousand miles from the seat of government. But suppose the officer should, by sickness, or some other accident, be rendered incapable of performing the functions of the office, must he be continued? And yet it is to be apprehended that such a disability would not furnish any good ground for impeachment; it could not be laid as treason or bribery, nor perhaps as a high crime or misdemeanor. Would gentlemen narrow the operation of the Constitution in this manner, and render it impossible to be executed?

Impeachment, he contended, was provided for in the Constitution as a means of removal for crimes and not as the ordinary means.

White, of Virginia, argued that in all cases the party who appointed ought to judge of the removal and the Senate must participate in the one as it did in the other.

Madison argued on the other side. To deny the President's power of removal would, he said, establish every officer of the Government in place during good behavior, which would be fatal to the Government. The President must have the power of removal from office, so that he might be held responsible for his subordinate's conduct, and the head of an Executive Department should be responsible to the President alone. To say that he must not be removed without the advice and consent of the Senate was to relieve the President of responsibility and make the Senate share it, and the Senate could not be held to accountability. "But why," he said, "it may be asked, was the Senate joined with the President in appointing to office, if they have no responsibility? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the character of the candidates than an individual; yet even here the President is held to the responsibility — he nominates, and, with their consent, appoints. No person can be forced upon him as an assistant by any other branch of the Government." There was another objection to the Senate sharing in the dismissal. It would tend to mingle the executive and legislative branches. It had been objected by those who were reluctant to accept the Constitution that the Senate shared too much of the executive power. It would be impolitic and unwise, therefore, to extend their power in this direction.

At the close of the debate the question was taken and by a considerable majority decided in favor of the right of removal.

The next day the House, still in Committee of the Whole, proceeded to the consideration of the bill to create a Treasury Department, and on May 21 agreed to the following:

> *Resolved,* That it is the opinion of this committee that there ought to be established the following Executive departments, viz: A Department of Foreign Affairs, at the head of which shall be an officer to be called Secretary to the United States for the Department of Foreign Affairs, removable by the President. A Treasury Department, at the head of which shall be an officer to be called Secretary to the United States for the Treasury Department, removable by the President. A Department of War, at the head of which shall be an officer to be called Secretary to the United States for the Department of War, removable by the President.
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> *Resolved,* That this House doth concur with the committee in the said resolution; and that a committee, to consist of eleven members, be appointed to prepare and bring in a bill or bills pursuant thereto.

The committee was elected, to consist of Abraham Baldwin, of Georgia, Vining, of Delaware, Livermore, of Massachusetts, Madison, of Virginia, Benson, of New York, Burke, of South Carolina, Fitzsimons, of Pennsylvania, Boudinot, of New Jersey, Gerry, of Massachusetts, and Cadwalader, of New Jersey.

Baldwin, the chairman of the committee, while he represented Georgia, had resided in his native State of Connecticut until the close of the Revolutionary war. He graduated at Yale in 1772, taught mathematics in that college until 1777, when he entered the army as a chaplain and served in that capacity till 1783. He then settled in Georgia, where he became a lawyer and was sent as a delegate to the Constitutional Convention. He was described by his contemporary, William Pierce, as "a gentleman of superior abilities, and joins in public debate with great art and eloquence."[5] He was a Republican and generally opposed to conferring extensive executive power. Of the other members of the committee the most notable characters were Madison, Ædanus Burke, and Elias Boudinot. Madison and Boudinot favored effective government and were not afraid of the power of the executive; but Burke was a radical of violent type, jealous of all government, and opposed to all grants of power.[6]

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[5] Pierce's notes. Am. Hist. Rev., III, 333.

The result of the deliberations of the committee were two bills presented to the House by Baldwin June 2, the first "to establish an Executive department, to be denominated the Department of War," the second "to establish an Executive department, to be denominated the Department of Foreign Affairs."

Although the bill to create the War Department was actually presented to Congress before the bill to create a Department of Foreign Affairs, the committee did not intend to accord precedence to the War Department, and the bill for the Department of Foreign Affairs was considered first. It came before the Committee of the Whole on June 16 and at once the debate concerning the removability of the Secretary was renewed, the arguments on both sides which had been made a month before being repeated and amplified, and continued for four days. The question was considered to be of vital importance and all the principal members spoke. There was felt to be force in William Smith's argument that if the President already had the power of removel by the Constitution it ought not to be expressly given him by the law, and on the fifth day, June 22, Benson moved to amend the bill so as simply to imply the power of removal in the President by altering the second clause, which provided for a Chief Clerk to be appointed by the Secretary and employed as he thought proper and in case of vacancy in the office of Secretary to have charge of the records and papers. He proposed to strike out the words "to be removable by the President" in the first clause of the bill and insert in the second clause, with reference to custody of the records by the Chief Clerk, the words, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." This was carried by a vote of 30 ayes to 18 noes, the words "to be removable by the President" being struck out by a vote of 31 ayes to 19 noes. The bill was then ordered to be engrossed and on June 24 passed by the House by a vote of 29 to 22.

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[6] His essay against the Society of the Cincinnati was translated into French by Mirabeau, and quoted in the French Assembly.

As it went to the Senate it read as follows:

> Be it enacted by the Congress of the United States that there shall be an executive department to be denominated the department of Foreign affairs: and that there shall be a principal officer therein, to be called the Secretary for the department of foreign affairs, who shall perform and execute such duties, as shall from time to time be enjoined on, or be entrusted to, him by the President of the United States agreeable to the Constitution, relative to correspondences Commissions, or instructions, to or with public Ministers or Consuls, from the United States, or to negotiations from foreign States or Princes, or to memorials or other applications, from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs, as the President of the United States may assign to the said department: and furthermore that the said principal officer, shall conduct the business of the said department in such a manner as the President of the United States shall from time to time, order or instruct.
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> And be it further enacted That there shall be in the said department, an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the Chief Clerk in the department of foreign affairs, and who whenever, the said principal officer shall be removed from office by the President of the United States, or in any other case of Vacancy shall during such vacancy have the charge and custody of all records, books and papers appertaining to the said department — Provided, nevertheless that no appointment of such chief Clerk shall be valid until the same shall have been approved by the President of the United States.
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> And be it further enacted, That the said principal officer, and every other person to be appointed or employed in the said department, shall before he enters on the exercise of his office or employment take an oath or affirmation, well and faithfully to execute the trust committed to him.
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> And be it further enacted that the Secretary for the department of foreign affairs, to be appointed in consequence of this act shall forthwith after his appointment be entitled to have the Custody and charge of all records books, and papers in the office of Secretary for the department of foreign affairs heretofore established by the United States in Congress assembled.
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> Passed the House June 24, 1789.

This is indorsed "Copy as it came from House."[7]

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[7] U. S. Senate MS. archives. The archives of the House covering this period were destroyed by the British in the war of 1812.

In the Senate the bill was again debated; but the sessions were held behind closed doors, and there is no record of what was said. It was passed July 18, with slight amendment, the proviso requiring the President's approval of the Chief Clerk being struck out, and the phrase " Congress of the United States" being altered to " Senate and House of Representatives of the United States of America in Congress assembled." [8] On the 20th the House agreed to the Senate amendments, without debate,[9] and the President signed the bill the 27th. The final act read:

An act for establishing an Executive Department, to be denominated the Department of Foreign Affairs.

(Sect. 1.) *Be it enacted by the senate and house of representatives of the United States of America in congress assembled,* That there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary for the department of foreign affairs, who shall perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the president of the United States, agreeable to the constitution, relative to correspondences, commissions, or instructions, to or with public ministers or consuls, from the United States, or to negociations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the president of the United States shall assign to the said department; And furthermore, that the said principal officer shall conduct the business of the said department in such manner as the president of the United States shall, from time to time, order or instruct.

(Sect. 2.) *And be it further enacted,* That there shall be in the said department an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief clerk in the department of foreign affairs; and who, whenever the said principal officer shall be removed from office by the president of the United States, or in any other case of vacancy, shall, during such vacancy, have the charge and custody of all records, books, and papers, appertaining to the said department.

(Sect. 3.) *And be it further enacted,* That the said principal officer, and every other person to be appointed or employed, in the said department, shall, before he enters on the execution of his office or employment, take an oath or affirmation, *well and faithfully to execute the trust committed to him.*

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[8] U. S. Senate MS. archives.

[9] Annals of Cong., I, 659.

> (Sect. 4.) *And be it further enacted,* That the secretary for the department of foreign affairs, to be appointed in consequence of this act, shall, forthwith after his appointment, be entitled to have the custody and charge of all records, books, and papers, in the office of secretary for the department of foreign affairs, heretofore established by the United States in congress assembled.[10]
>
> (Approved, July 27, 1789.)

On July 23, before the final passage of this act, but after it had passed the House, Vining elaborated his plan for a Home Department and offered the following:

> That an Executive department ought to be established, and to be denominated the Home department; the head of which to be called the Secretary of the United States for the Home Department; whose duty it shall be to correspond with the several States, and to see to the execution of the laws of the Union; to keep the great seal, and affix the same to all public papers, when it is necessary; to keep the lesser seal, and to affix it to commissions, &c.; to make out commissions, and enregister the same; to keep authentic copies of all public acts, &c.; and transmit the same to the several States; to procure the acts of the several States, and report on the same when contrary to the laws of the United States; to take into his custody the archives of the late Congress; to report to the President plans for the protection and improvement of manufactures, agriculture, and commerce; to obtain a geographical account of the several States, their rivers, towns, roads, &c.; to report what post roads shall be established; to receive and record the census; to receive reports respecting the Western territory; to receive the models and specimens presented by inventors and authors; to enter all books for which patents are granted; to issue patents, &c.; and, in general, to do and attend to all such matters and things as he may be directed to do by the President.[11]

His proposition met with little favor. Benson thought "the less the government corresponded with particular States the better;" and White gave it as his opinion that correspondence with States was the business of the Chief Executive, and it belonged to the judiciary to see that the laws were executed. The great seal might be kept by the Secretary of Foreign Affairs, and the lesser seal also.[12] Commissions should be made out by the Departments under which the appointees were to serve. The public acts could be sent to the executives of the States by the officers of Congress. Post roads properly belonged under the supervision of the Postmaster-General, and it was hardly necessary to establish a great department for the purpose of receiving the models, specimens, and books presented by inventors and authors.

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[10] 1 Stats. at Large, 28.

[11] Annals of Cong., I, 666.

[12] There was no lesser seal then, nor was one ever authorized.

Huntington, of Connecticut, though the Secretary of Foreign Affairs was not so overcharged with business that he would be unable to attend to most of the duties mentioned by Vining.

To this Vining said that the duties mentioned in his resolutions were necessary, but that they were foreign to each of the Departments projected. He thought they could best be performed by a confidential officer under the President.

Sedgwick, of Massachusetts, replied that he believed the office unnecessary, and that if the motion was negatived he would bring in one to assign the principal part of the duties designed for the Home Department to the Secretary of Foreign Affairs.

Vining's motion having been defeated by a large majority, Sedgwick moved "that a committee be appointed to bring in a bill supplementary to the act establishing the Department of Foreign Affairs, declaring that Department to be hereafter denominated ——, and that the principal officer in that Department shall have the custody of the records and seal of the United States, and that such bill do contain a provision for the fees of office to be taken for copies of records, and further provision for the due publication of the acts of Congress, and such other matters relating to the premises, as the committee shall deem necessary to be reported to this House."

This motion was also defeated. It gave, however, form to the idea, which had been developed in debate, that the Department of Foreign Affairs would be the most convenient place for performing those functions which did not naturally fall to the Departments of Finance and War.

On July 27 the House, in Committee of the Whole, took into consideration the report on the joint rules to be established with the Senate "for the enrollment, attestation, publication, and preservation of the acts of Congress, and to regulate the mode of presenting addresses and other acts to the President of the United States," and agreed upon rules which prescribed how bills should be enrolled, compared, and presented to the President. This left the final disposition and promulgation of laws unprovided for, and the following was adopted:

> *Resolved,* That it is the opinion of this committee, that a committee ought to be appointed to prepare and bring in a bill or bills, to provide, without the establishment of a new department, for the safe keeping of the accounts, records, and seal of the United States; for the authentication of records and papers; for establishing the fees of office to be taken for commissions, and for copies of records and papers; for making out and recording commissions, and prescribing their form; and to provide for the due publication of the acts of Congress.

To carry out the resolution Theodore Sedgwick, George Matthews, of Georgia, and Henry Wyncoop, of Pennsylvania, were appointed a committee.

Like Baldwin, who presented the bill to establish the Department of Foreign Affairs, Theodore Sedgwick was born in Connecticut and educated at Yale. He went to Massachusetts at an early age, served through the Revolution, was a member of the Massachusetts legislature on several occasions, and was an active member of the Massachusetts convention which ratified the Constitution of the United States. Unlike Baldwin, he was a strong Federalist, but no party lines were applied in considering the creation of the Departments. Sedgwick served in the House until 1796, when he was elected a Senator. He was again in the House in 1799, when he was chosen Speaker. In 1802 he went on the Supreme Bench of Massachusetts, where he remained until his death in 1813.

Four days after his committee was appointed (on July 31) he offered the House "a bill to provide for the safe keeping of the acts, records, and great seal of the United States, for the publication, preservation, and authentication of the acts of Congress, &c.," which was read and laid upon the table. On Monday, August 3, it was taken up and made a special order for Friday the 7th, but was not considered till August 27, when it was passed without recorded debate and sent to the Senate, being received by that body August 28 and committed on September 2 to a committee composed of Rufus King, of New York, William Paterson, of New Jersey, and Jacob Read, of South Carolina. On September 7 it was agreed to with unimportant amendments and received back by the House. The next day the amendments were agreed to and it was approved by the President September 15.

It read as follows:

An act to provide for the safe keeping of the Acts, Records and Seal, of the United States, and for other purposes.

(Sect. 1.) *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Executive department, denominated the Department of Foreign affairs, shall hereafter be denominated the Department of State, and the principal officer shall hereafter be called the Secretary of State.

(Sect. 2.) *And be it further enacted,* That whenever a bill, order, resolution, or vote of the Senate and House of Representatives, having been approved and signed by the President of the United States, or not having been returned by him with his objections, shall become a law, or take effect, it shall forthwith thereafter be received by the said Secretary from the President: and whenever a bill, order, resolution, or vote, shall be returned by the President with his objections, and shall, on being reconsidered, be agreed to be passed, and be approved by two thirds of both Houses of Congress, and thereby become a law or take effect, it shall, in such case, be received by the said Secretary from the President of the Senate, or the Speaker of the House of Representatives, in whichsoever House it shall last have been so approved; and the said Secretary shall, as soon as conveniently may be, after he shall receive the same, cause every such law, order, resolution, and vote, to be published in at least three of the public newspapers printed within the United States, and shall also cause one printed copy to be delivered to each Senator and Representative of the United States, and two printed copies duly authenticated, to be sent to the Executive authority of each State; and he shall carefully preserve the originals, and shall cause the same to be recorded in books to be provided for the purpose.

(Sect. 3.) *And be it further enacted,* That the seal heretofore used by the United States in Congress assembled, shall be, and hereby is declared to be, the seal of the United States.

(Sect. 4.) *And be it further enacted,* That the said Secretary shall keep the said seal, and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States to be appointed by the President, by and with the advice and consent of the Senate, or by the President alone. *Provided,* That the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States, nor to any other instrument or act, without the special warrant of the President therefor.

(Sect. 5.) *And be it further enacted,* That the said Secretary shall cause a seal of office to be made for the said department, of such device as the President of the United States shall approve, and all copies of records, and papers, in the said office, authenticated under the said seal, shall be evidence equally as the original record, or paper.

(Sect. 6.) *And be it further enacted,* That there shall be paid to the Secretary, for the use of the United States, the following fees of office, by the persons requiring the services to be performed, except when they are performed for any officer of the United States, in a matter relating to the duties of his office, to wit; For making out and authenticating copies of records, ten cents for each sheet containing one hundred words; for authenticating a copy of a record, or paper, under seal of office, twenty five cents.

(Sect. 7.) *And be it further enacted,* That the said Secretary shall, forthwith after his appointment, be entitled to have the custody and charge of the said seal of the United States, and also of all books, records, and papers, remaining in the office of the late Secretary of the United States in Congress assembled; and such of the said books, records, and papers, as may appertain to the Treasury department, or War department, shall be delivered over to the principal officers in the said departments, respectively, as the President of the United States shall direct.

(Approved September 15, 1789.)[13]

This act was supplemented by the following which was presented in the House September 18 and concurred in by the Senate on the same day:

*Resolved,* That it shall be the duty of the Secretary of State to procure, from time to time, such of the statutes of the several states as may not be in his office.

(Approved, September 23, 1789.)[14]

In the meantime, the question of the compensation of the heads of Departments had been fixed by the act approved September 11, 1789, at $3,500 per annum for the Secretary and $800 for the Chief Clerk and such clerks as might be necessary at not more than $500 each.[15]

Early in June, 1789, while the old Department of Foreign Affairs still existed, Washington wrote to John Jay, asking for "some informal communication from the office of Secretary for Foreign

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[13] 1 Stats. at Large, 68.

[14] *Id.*, 97.

[15] *Id.*, 67.

Affairs;"[16] and during the fifty days of existence of the new Department of Foreign Affairs he continued to act as Secretary. He acted as Secretary of State, also, until Thomas Jefferson took control in February of the ensuing year.

The records intended for the Department Charles Thomson had had in his keeping as long as the old Congress lasted; but they were, upon his resignation, delivered to Roger Alden by order of Washington. "You will be pleased, Sir," Washington wrote Thomson July 24, "to deliver the Books, Records and Papers of the late Congress — the Great Seal of the federal Union — and the Seal of the Admirality, to Mr. Roger Alden, the late Deputy Secretary of Congress, who is requested to take charge of them until further directions shall be given."[17]

Information of the law authorizing the new Executive Department of Foreign Affairs was conveyed by the President to the governors of the several States July 5, and September 21 they were informed of the passage of the act making it the Department of State. A few days later Jay was nominated to be Chief Justice and Thomas Jefferson to be Secretary of State, and both were commissioned September 26.

Jay accepted at once, but continued to discharge the duties of Secretary of State for some months. Under date of October 13, Washington informed Jefferson of his appointment, and added that "Mr. Jay had been so obliging as to continue his good offices." Mr. Alden, he said, had the state papers and Mr. Remsen those relating immediately to foreign affairs.[18]

When this letter was written, Jefferson had not yet returned to America from his mission to France. Upon his arrival Jay wrote to him, December 12, congratulating him upon his appointment and recommending to him favorably "the Young gentlemen in the office."[19] Jefferson accepted the office in the following letter to the President:

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[16] Correspondence and Public Papers of John Jay, III, 369.

[17] Department of State MS. archives.

[18] Department of State MS. archives.

[19] Correspondence and Public Papers of John Jay, III, 381.

Monticello Feb. 14, 1790

Sir

I have duly received the letter of the 21st of January with which you have honored me, and no longer hesitate to undertake the office to which you are pleased to call me. Your desire that I should come on as quickly as possible is a sufficient reason for me to postpone every matter of business, however pressing, which admits postponement. Still it will be the close of the ensuing week before I can get away, & then I shall have to go by the way of Richmond, which will lengthen my road. I shall not fail however to go on with all the dispatch possible nor to satisfy you, I hope, when I shall have the honor of seeing you at New York, that the circumstances which prevent my immediate departure, are not under my controul. I have now that of being with sentiments of the most perfect respect & attachment, Sir

Your most obedient & most humble servant

TH. JEFFERSON.

The President of the U. S.[20]

Shortly afterwards he assumed office, the records were turned over to him, and the Department of State was fairly started in its career.

GAILLARD HUNT.

[The next section will be The New Department.]

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[20] Department of State MS. archives.

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# EDITORIAL COMMENT

## THE SECOND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The second annual meeting of the American Society of International Law was held at Washington, D. C., on April 24 and 25, at the New Willard Hotel, and was largely attended by members of the Society. The meeting was called to order on Friday, April 24, at 10 o'clock, by the president of the Society, the Hon. Elihu Root, who, after a brief address of welcome in which he set forth the aims of the Society and the progress made in the past year, delivered an address on "The Sanction of International Law." As this number of the JOURNAL contains the address in full it is unnecessary to quote any passages from it. It should be said, however, that aside from its intrinsic merits the address was important for the reason that his professional experience enabled the president to speak with peculiar authority on the sanction of municipal and international law. A lifetime spent in the court room necessarily familiarized him with the necessity and the form of sanction present in municipal law, and his position as Secretary of State enabled him — indeed, in a large measure required him — to analyze the sanction supposed to exist in international law, and to set it forth clearly and precisely. The fact that the speaker, as a result of professional practice and experience, finds the ultimate sanction of municipal law and international law to be the same — namely, the public opinion of the community, whether it be national or international — goes far to meet the objection of the theorist who, without professional experience, fails to find the sanction which the man of affairs discovers without difficulty and everywhere existing.

The first topic for discussion, "Should the violation of treaties be made a Federal offense?" was admirably treated in a carefully prepared paper by ex-Senator Turner, of Washington, who expressed the belief that the violation of treaties should be made a Federal offense and that an act of Congress to carry out the provisions of a treaty and penalizing their violation would be as constitutional as it is wise and expedient. The Hon. George Gray, of Delaware, and the Hon. Swagar Sherley, of Kentucky, took an active part in the discussion of the paper, as did also Frederick R. Coudert, of the New York bar. Judge Gray felt that a Federal act might interfere with the reserved rights of the States, whereas Mr. Sherley expressed the view that the act would not only be proper in itself, but that it would not improperly interfere with the doctrine of State rights. Mr. Coudert, while treating the subject from a more general and less technical standpoint, concurred with the views expressed in the leading paper. It will be noted that Senator Turner's treatment was not merely academic but practical, for at the conclusion of his paper he proposed two drafts of a bill which in his opinion would adequately meet the difficulties of the case.

In the afternoon session Prof. Paul S. Reinsch, of the University of Wisconsin, read a careful paper on the question, "How far should loans raised in neutral nations for the use of belligerents be considered a violation of neutrality?" The Hon. Oscar S. Straus, who presided at the session, and who has made himself in recent years the most conspicuous champion of the affirmative, dealt with the subject at length in his opening address. The subject was so carefully treated by the two speakers as to leave little room for discussion or comment; for Mr. Reinsch's paper, while outlining the question, called attention to the advantages and difficulties with such impartiality and detail as to preclude the presentation of individual views or preferences.

The evening session began at 8 o'clock, with the Hon. George Gray in the chair. The topic of the evening was "Arbitration at the Second

Hague Conference," and in this instance the two addresses were so careful, thorough, and so expressive of the opinions of the audience that they were accepted as final statements without discussion or comment. Gen. Horace Porter treated the work of the Second Conference sympathetically and with the detail to be expected from one who had himself played a great and leading part in the conference. Mr. R. C. Smith, K. C., of the Montreal bar, read the second paper and by his presence emphasized the international character of the Society as well as the belief of the enlightened that the Second Hague Conference deserves well of the community of nations.

The Saturday morning session, with General Porter in the chair, dealt with the problem of the codification of international law, its desirability and its progress. Prof. George G. Wilson, of Brown University, presented an able and instructive paper on the work of the Naval War College in the codification of maritime international law, and was followed by Jackson H. Ralston, who spoke of the need of a code of international law for the purpose of mixed commissions and international tribunals which have to deal with vexed and doubtful points submitted for their consideration.

The afternoon session was presided over by Professor Wilson and was devoted to the consideration of the organization, jurisdiction, and procedure of an international court of prize. The Society was fortunate on this occasion to have the advisability of an international court of prize presented to its consideration by a former justice of the Supreme Court, the Hon. Henry B. Brown, who by years of experience on the bench has a first-hand familiarity with the difficult questions of prize law. While stating that certain provisions of the proposed court were open to technical, perhaps constitutional, objection, he nevertheless hailed the prize court as a great and genuine advance and stated that the Second Hague Conference would have justified its calling if it had done nothing more than elaborate the project for the establishment of an international court of prize. On behalf of the admiralty bar Harrington Putnam, esq., of New York City, spoke in behalf of the court. The discussion closed with a few words by Mr. James Brown Scott, regarding the importance of the proposed court.

At the annual business meeting, Prof. Louis Renault, Professor of International Law at the Paris Law School and the School of Political Sciences, was elected honorary member of the Society, and the following officers were chosen for the ensuing year:

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Hon. Elihu Root

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Justice David J. Brewer
Justice William R. Day
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On Friday afternoon, at 2.30, the President of the United States, attended by the president of the Society, the Hon. Elihu Root, and the Secretary of War, the Hon. William H. Taft, received the members in attendance at the meeting, and on Saturday evening, at 7 o'clock, the second annual meeting was closed with a banquet at the New Willard Hotel, where one hundred and eleven of the members and guests gathered together The president of the Society presided as toastmaster, and addresses were delivered by the Hon. Oscar S. Straus, Secretary of Commerce and Labor, vice-president of the Society and chairman of the Executive Committee; Gen. Horace Porter, vice-president of the Society; the Reverend Bishop O'Connell, rector of the Catholic University of America; R. C. Smith, K. C., of Montreal, Canada; and the Hon. David J. Brewer, Justice of the Supreme Court of the United States and vice-president of the Society.

### THE PENNSYLVANIA ARBITRATION AND PEACE CONFERENCE

On May 16 to 19, 1908, a notable conference on arbitration and peace was held in the city of Philadelphia. Its objects, as stated in the published program, were:

> First. To promote the universal acceptance of the principles of international arbitration, and the establishment of permanent courts of justice for the nations, as the only practical means to ensure the blessings of peace by making wars improbable, and ultimately impossible, in the civilized world.
>
> Second. To give the people of Pennsylvania an opportunity to commend the splendid record of the United States with regard to arbitration, and to pledge their active and earnest support to every effort of our government to continue the work and to carry out the recommendations of the great Hague Conference of 1907.
>
> Third. To form and provide for an effective representation of public sentiment upon the great issues making for international friendship and world organization that should signalize the Third Hague Conference.

Six sessions of the conference were held, besides the banquet on Tuesday evening and a series of meetings held on Sunday in the various churches in the city.

Hon. Philander C. Knox, Senator of Pennsylvania, was president of the conference. Among the notable men who took part were Hon. David J. Brewer, Justice of the Supreme Court of the United States; Hon. William P. Potter, Justice of the Supreme Court of Pennsylvania; Hon. Edwin S. Stuart, Governor of Pennsylvania; Hon. William Jennings Bryan, of Nebraska; Hon. William L. Penfield, former Solicitor of the Department of State, counsel for the United States in the Pious Fund Cases, and agent for the United States in the Venezuelan Arbitration Cases at The Hague in 1903; Dr. James Brown Scott, Solicitor, Department of State, Washington, D. C., technical delegate of the United States to the Second Hague Conference; Jackson H. Ralston, esq., Washington, D. C., umpire of the Italian Commission in the Venezuelan Arbitration Cases, and agent for the United States in the Pious Fund Cases; Charles C. Harrison, provost of the University of Pennsylvania; Hon. Wayne MacVeagh, Philadelphia, former Attorney-General of the United States; Hon. Richard Bartholdt, member of Congress from Missouri, president of the United States group of the Interparliamentary Union; Benjamin F. Trueblood, LL.D., secretary of the American Peace Society; and Edwin D. Mead, esq., Boston, vice-president of the American Peace Society.

Many of the addresses which were delivered were valuable contributions to the literature of the arbitration movement; they were much more technical and scientific in character than addresses at such conferences usually are. The proceedings themselves were a demonstration of the fact that the arbitration movement is rapidly advancing from an ideal and theoretical to a practical and scientific stage in which lawyers skilled in international law must have a controlling part. Some of the addresses are worthy of special mention.

At the great meeting on Monday evening, at the Academy of Music, Dr. Scott presented a paper, discussing the need of an international court of justice. Following closely the argument which he delivered before the Second Peace Conference at The Hague on the same subject, he pointed out the defects of the present system of international arbitration, and quoted Mr. Root's words that "what we need for the further development of arbitration is the substitution of judicial action for diplomatic action; the substitution of a judicial sense of responsibility for a diplomatic sense of responsibility." Dr. Scott then considered the character of the judges who should sit in the international court, the jurisdiction which it should exercise, and the manner in which it should be constituted. The topic last mentioned was of special interest, because of the entire failure of the Second Peace Conference at The Hague to deal with it successfully. Starting upon the assumption that all sovereign states are juridically equal, he pointed out that, considered from the standpoint of material interests, they are very unequal; that there is "a sensible relation between population, wealth, and industry, on the one hand, and lawsuits on the other;" and that as the large nations will have more disputes to settle, and therefore more interest in the decisions of the court, they should have a larger representation upon it. Without attempting a solution of the method of distributing the judges among the various nations, he suggests that fifteen or sixteen would be a proper number, pointing out that these judges should be so selected as to be trained in the various systems of law of the world.

Mention should also be made of the excellent paper presented by Jackson H. Ralston, esq., of the Washington bar, in which he took the strong position, supporting it by able argument, that no disputes — not even those said to involve the vital interests, honor, or independence of the nations — should be reserved from arbitration.

Attention should also be called to the exceedingly able address of Judge Penfield upon international courts of justice. His paper was a comprehensive review of the history of international courts of justice and a discussion of their present status and possible future.

The other addresses were by no means without interest, but, with the exception of one discussing the constitutionality of the proposed international prize court, published elsewhere in this number, they were not of a technical nature and are therefore of less interest to the readers of this JOURNAL.

The resolutions adopted by this conference show the very intelligent and advanced position which it took on several subjects. The resolutions follow:

> 1. We express our profound satisfaction in the long record of the United States as an advocate of international arbitration, and in the great number of cases in which it has secured an honorable settlement of serious difficulties without a resort to war. We especially commend the admirable course of our Government at the Second International Peace Conference at The Hague, and pledge our active and cordial support to every effort to fulfill the recommendations of that conference. There are no other means by which our nation can render so great a service to humanity, or do so much for the moral development and material prosperity of its own citizens.
>
> 2. The difficulties which have hitherto prevented a general agreement for the limitation of national armaments should not be permitted to obscure the plain reasonableness and imperative necessity for further efforts in that direction. Modern conditions have made it impossible for any of the leading nations to add materially to their relative military or naval strength, because every addition to the fighting force of one country leads at once to a corresponding increase in the other countries, and these secondary increases are made to serve in their turn as conclusive arguments for still greater and still more injurious and demoralizing

expenditures and efforts by all the powers. It is obvious that this self-multiplying and self-perpetuating process can end only in physical and financial exhaustion unless it can be halted by some kind of mutual understanding or agreement, and we therefore emphatically endorse the recommendation of the Hague conference that the serious study of this vital problem should be again undertaken by all the nations.

3. We strongly approve the proposal to establish an international prize court at The Hague. We realize the injustice of the present system by which neutral vessels accused of violating the laws of war are judged in the courts of the captor, and by which foreign citizens unjustly deprived of their property can seek redress only through the expensive, unsatisfactory, and wearisome method of diplomatic intervention. We welcome the proposed court not only as providing a speedy and equitable method of adjusting one class of international disputes, but as a happy augury of a more complete system of world judicature to be established in future. We believe that the United States will honor itself by providing for appeals from its courts to the international prize court, and affirming our belief in the constitutionality of the measure we urge the United States Senate to speedily ratify the convention without waiting for a world agreement relative to the laws concerning maritime captures, believing that the jurists who shall compose the court can be trusted to decide the law in such cases in full accord with the principles of "justice and equity."

4. We especially congratulate the United States delegation to The Hague upon its distinguished service in securing the recommendation of the establishment of an international court of arbitral justice in the form agreed upon "as soon as an agreement shall have been reached upon the selection of the judges and the constitution of the court." We call attention to the fact that the recommendation, naming no number of powers who must consent, leaves it open for the court to be established at The Hague so soon as three or more nations shall agree upon the method of selecting the judges. Until such a court is created to which the nations of the earth may resort with the assurance that their disputes will be judicially considered and rightly decided, resort to the law of violence will be in some cases inevitable.

We strongly urge the United States Government to take every action which it may deem expedient to secure the consent of two or more other nations to establish this great world court, believing that in this way it is now possible to render a most signal and memorable service to all mankind.

5. We urge as a matter of primary importance that there shall be a general adoption of the proposal that conferences similar to this shall be held in every State of the Union, for promoting the universal acceptance of the principles of international arbitration and the establishment of permanent courts of justice for the nations, as the only practical means to ensure the blessings of peace by making wars improbable, and ultimately impossible, in the civilized world. Such conferences will serve as the organizers and representatives of public opinion in their respective States. Their executive committees, acting together through delegates or otherwise, will exert a powerful influence in supporting the efforts of our National Government, and in other ways will promote the cause of international arbitration at home and abroad.

6. The president of this conference is hereby requested and empowered to appoint an executive committee of twenty-five, with power to add to, and to fill vacancies in, its own number. It shall be the duty of the said executive committee to act as the representative of this conference for the continuance of its work and the promotion of its objects, and for those purposes it is authorized in its discretion to confer and cooperate with other bodies or committees or individuals from any part of the United States or other countries. It is also empowered to call another meeting of this conference, or to organize a State association for similar purposes, if it shall at any time find that such action will be advisable.

## THE FOURTEENTH LAKE MOHONK CONFERENCE

It will be remembered that it was at the Mohonk conference of 1905 that the first steps were taken toward the organization of the American Society of International Law and the publication of this Journal. It is, therefore, an especial pleasure to the American Journal of International Law to notice the meeting of the Fourteenth Lake Mohonk Conference on International Arbitration, which met at Mohonk Lake, N. Y., on May 20, 21, and 22, 1908, in response to the generous hospitality and under the wise leadership of Hon. Albert K. Smiley. The conference was large and enthusiastic. For the fourth time the Hon. John W. Foster presided over the conference with his accustomed courtesy and ability.

Among those in attendance were Justice Brewer, of the United States Supreme Court; Chief Justice Moore, of Michigan; ex-Chief Justices Stiness and Matteson, of Rhode Island; Baron Takahira, the Japanese ambassador; Hon. James Brown Scott, Solicitor for the Department of State; Hon. John Barrett, Director of the Bureau of American Republics; Dr. Benjamin F. Trueblood, secretary of the American Peace Society; Mr. Clinton Rodgers Woodruff, secretary of the National Municipal League; Mr. Rollo Ogden, of the New York Evening Post; Mr. Hamilton Holt, of the Independent; Hon. Charles F. Manderson, of Nebraska; Hon. Thomas M. Osborne, mayor of Auburn, Public Service Commissioner of New York State; Hon. Samuel J. Barrows; Hon. Robert Lansing; Gen. Horatio C. King; Hon. W. F. Frear, Governor of Hawaii; Hon. Everett P. Wheeler; Hon. William J. Coombs; and Prof. George G. Wilson, who has been recently designated as one of the representatives of the United States at the International Maritime Conference to be held in London this fall.

The Mohonk conferences have of late years given special attention to arousing the interest of the educators and the business men in the cause of international arbitration, and a large number of these gentlemen were present. Many of the business men were especially designated as representatives by leading commercial bodies of the country, while among the educators — besides the Hon. Elmer E. Brown, United States Commissioner of Education, and Dr. Andrew S. Draper, New York Commissioner of Education — Columbia University, Johns Hopkins University, New York University, Cincinnati University, Brown University, University of Georgia, George Washington University, and Smith, Bryn Mawr, Lafayette, Swarthmore, and Vassar colleges were represented by one or more members of their respective faculties.

The first session of the Mohonk conference is always devoted to a recounting of the achievements of the past year along the line of international arbitration, and this year the conference had much to recount. Mr. Smiley, in his brief opening address, struck the keynote of the conference when he referred to the work of the Second Hague Conference as worthy of high praise even when tested by the standard of the expectations which had been entertained by the members of the last Mohonk conference which met just prior to the meeting at The Hague, as expressed in the platform then adopted.

General Foster and Dr. Trueblood gave interesting and inspiring addresses devoted to a general survey of the progress of arbitration during the past year, and the session was closed with an address by the Hon. James Brown Scott, a member of the American delegation to the Second Hague Conference, who rendered an account of his stewardship by giving a careful analysis of the results of the Hague Conference. Altogether it was a notable session.

Space forbids even a mention of the many other excellent addresses delivered at other sessions of the conference. No account of the conference would be complete, however, without reference to the address of Dean Kirchwey, of Columbia University, on "International Law and the World's Peace," in which he drew the parallel between private and public war, the court for the individual and the international tribunal for the nation; and the address of Rollo Ogden, editor of the New York Evening Post, on the relations of the press to the cause of international arbitration. The conference was also honored by communications from Ambassador Bryce and Minister Calvo, of Costa Rica, which were read to the conference.

It has always been the aim of Mr. Smiley that the Mohonk conferences should be practical as well as prophetic, or, in the language of one of the members of the present conference, "should be as a man who, while looking above the clouds, still keeps his feet upon the ground."

It is as inevitable as it is desirable in a gathering of this character that there should be differences of opinion, and it has always been Mr. Smiley's desire that these divergent views should be freely expressed in the conference. It has, however, been the policy of the conference only to embody those principles in the platform upon which a unanimous agreement could be reached, inasmuch as it has been believed that in this way the influence of the conference would be greatest and it would be best able to maintain the continued interest and adhesion of a large number of valuable and practical members.

This policy was followed at this year's conference, and occasioned the only criticism of the conference which we have seen expressed, to the effect that the platform adopted "was too retrospective. It dealt almost exclusively with what has been accomplished and gave no real lead, except by implication, as to what should be further done." This criticism arises out of the treatment of the subject of the limitation of armaments in the platform.

As is well known, it was found impossible to accomplish any practical result at the Hague Conference as regards the limitation of armaments, the conference being forced to content itself with remitting the matter to the powers for further study. Under these circumstances it seemed to many, although probably a minority, of those in attendance at Mohonk that it would be not only useless but undesirable for the conference to express any opinion in favor of the limitation of armaments in its platform at the present time. And to this opinion others, like Justice Brewer, who moved the adoption of the platform, although he would have preferred to see it contain some expression in regard to the limitation of armaments, yielded their wishes in order that the platform might be adopted unanimously. Still others, however, felt so strongly that the platform should contain some indorsement of the gradual and progressive limitation of armament that it was moved on the floor of the conference to recommit the platform to the committee which had prepared it in order that a declaration in this sense might be inserted. This motion would have undoubtedly precipitated a lively debate and the result of any vote which might have been taken would have been in doubt but for the fact that the motion was withdrawn in deference to Mr. Smiley's wish that no action might be taken in regard to a matter as to which unanimity could not be obtained. It is believed that Mr. Smiley's wisdom, which has made possible the great usefulness that the Mohonk conference has had in the past, was never more clearly exemplified than by his suggestion in this case, which was immediately and cheerfully accepted by all the members of the conference.

The Mohonk conference owes its peculiar and fortunate position in relation to the arbitration movement to the fact that it has constantly refused to become a "peace conference," but has persisted in remaining a forum for the scientific discussion of arbitration as a practical substitute for war. The conference has always believed that peace between nations can only come through the judicial settlement of disputes, just as peace between men has come through the ordinary courts of justice.

Even a brief review of the history of the conference and of the platforms which have been adopted during the fourteen years which have elapsed since the first meeting in 1895 will show how closely the conference has adhered to the ideal of its founder, as expressed in the remarks with which Mr. Smiley opened the first conference in 1895, in which he asked that the discussion might be confined to the subject of arbitration as distinguished from the broader subjects of peace and war, and have special reference to obtaining practical results. The review of the various platforms adopted shows that with the exception of a few unimportant expressions in one or two platforms each conference has not only confined itself to arbitration, but has endeavored as much as possible to concentrate its attention on, and to reflect in its platform, the most pressing and practical phases of the general topic of arbitration. Space forbids a detailed examination of the various platforms adopted. The following excerpt from an article written by the permanent secretary of the conference in 1901 may, however, suffice by way of summary as showing the emphasis of the platforms adopted during the early years of the conference:

> In '95 and '96 the efforts of the conference were directed especially toward securing an arbitration treaty with England. In '97 the causes of the defeat of the Olney-Pauncefote treaty, which had meanwhile been negotiated and defeated in the Senate, were carefully considered, and an expression of the year before in favor of a permanent tribunal open to all nations was emphasized. In '98 the conference, in the platform which is already adopted summarizing the conclusion of the meeting, declared in favor of the United States taking the lead in calling an international conference to set up such a tribunal. In '99 the conference met simultaneously with the Peace Conference at The Hague, and devoted its attention especially to preparing the way for the favorable acceptance in the United States of the results of that conference. In 1900 the con-

ference declared in favor of the United States entering into treaties with the other powers of Europe agreeing to submit all controversies that threaten war to the Hague Tribunal. At the conference in 1901 especial attention was devoted to the desirability of having the United States break the international ice by submitting some questions to the new tribunal.

It may be pertinent to add that the conference of 1901 also pointed out that the natural and ultimate result of the triumph of international arbitration would be "the reduction of armaments and the lessening of the burdens and the temptations they entail," thus clearly indicating the recognition by the conference at that time that the limitation of armaments would be a product, rather than a cause or even an accompaniment, of the general adoption of arbitration as a recognized means for the settlement of international disputes.

Although the conference of 1906 expressed the hope that the Second Hague Conference would consider favorably the general restriction of armaments by concurrent international action, it was apparent at the time of the meeting of the conference in 1907 that such a restriction at present is not practicable, and accordingly, at its meeting on the immediate eve of the Second Hague Conference, the Mohonk conference "urged as the most immediate and important action to be taken by the Second Hague Conference" the following measures, among which it will be noted the limitation of armaments is not mentioned:

1. A provision for stated meetings of the Hague Conference.
2. Such changes in the Hague Court as may be necessary to establish a definite judicial tribunal always open for the adjudication of international questions.
3. A general arbitration treaty for the settlement of international disputes.
4. The establishment of the principle of the inviolability of innocent private property at sea in time of war.
5. A declaration to the effect that there would be no armed intervention for the collection of private claims when the debtor nation is willing to submit such claims to arbitration.

It will thus be seen that the constant effort of the conference has been to devote itself, not to the past or to the distant future, but to the problems of the immediate present. It has tried not to waste energy in spying out the enemy's country or in guarding the baggage, but has employed all its available forces at the immediate point of contact. Naturally, the platforms have varied more or less in character from year to year as the membership of the platform committee has varied, but they have varied still more in accordance with the situation which they were intended to meet. Always they have looked toward the stimulation of public sentiment, and in these later years especial attention has been given to the educational and business world. But when there were any steps which appeared to be of immediate practical value to the cause of international arbitration the conference has endeavored to concentrate its attention on these steps. Especially when the conference has met before international gatherings like the Hague or the Pan-American conferences, it has endeavored to suggest measures which it believed to be possible and practicable for those conferences to consider. When a meeting of the Mohonk conference has followed an international conference, the former has recounted the ground gained and sought to secure the fruits of whatever victories may have been won. The present conference met after the meeting of the Second Hague Conference at which the Mohonk conference believed notable results had been achieved. The conference believed that our Government is doing everything in its power to render effective all that was agreed upon or proposed at the Second Hague Conference. The immediate limitation of armaments appeared to many of the members present totally impracticable. Under these circumstances it is believed that the immense progress which the cause of international arbitration has made and is making renders it impossible for the platform of any arbitration conference to be other than largely retrospective and complacent, while the adoption of a plank declaring for the limitation of armaments, which, as was pointed out in the platform of 1901, will be a natural result and consequence of the triumph of international arbitration, appeared to many members of the conference likely to have no other practical effect than the alienation of many who are heartily in favor of and efficiently working for international arbitration, and therefore ultimate disarmament. It is believed that the platform adopted, which follows, was a proper reflection of the conditions which produced it:

> The Fourteenth Lake Mohonk Conference on International Arbitration recognizes with profound gratitude the continuous and conscious development of the forces which make for international peace through international justice.
>
> It especially approves and commends the work of the Second Hague Conference, which revised and perfected the various conventions of the conference of 1899, as follows:
>
> Restricting the use of force in the collection of contract debts; proclaiming unanimously the principle of obligatory arbitration; establishing an International Court of Prize, and declaring in favor of the establishment of a Permanent Court of Arbitral Justice.
>
> These measures are a great and welcome advance towards the regulation of international relations upon the basis of justice, reason, and respect for law.

The Fourteenth Lake Mohonk Conference on International Arbitration notes with pleasure the existence of fifty and more treaties of arbitration concluded within the past five years, and more especially the arbitration treaties concluded between the United States and France, Great Britain, Italy, Japan, Mexico, Switzerland, Holland, Norway, Sweden, Portugal, and Spain. The conference, therefore, expresses the hope that the peaceful and judicial settlement of international difficulties by resort to courts of arbitration and of justice bids fair to become the rule of the future, as it has been in a measure the enlightened practice of the immediate past.

The Fourteenth Lake Mohonk Conference on International Arbitration further commends the activities of our schools, colleges, universities, and the various professional, business, and labor organizations of the country by which and through which popular sentiment is created, trained, and directed, not merely to the maintenance of peace, but also, by the elimination of the ostensible causes of war by peaceful settlement, to the prevention of war itself.

Finally, the Fourteenth Lake Mohonk Conference on International Arbitration rejoices in the fact that the representation of all the civilized nations of the world in the Second Hague Conference, and the recommendation in its final act for a future conference, guarantee, for the future, a conference of an international and permanent character, capable of correcting the inequalities of international practice and of enacting a code of international law based upon justice and equity.

## THE NEW BUILDING OF THE INTERNATIONAL BUREAU OF THE AMERICAN REPUBLICS

On the 11th day of May, 1908, in the presence of representatives of Latin America and of the United States, the corner stone of the new building of the International Bureau of American Republics was laid in the capital of our country. The occasion was a notable one, not merely from the presence of and addresses by President Roosevelt, Secretary Root, Ambassador Nabuco, and Andrew Carnegie, but as visible evidence of the fact that the Western Hemisphere is little by little being drawn into closer, more intimate, and sympathetic connection, and that Pan-America is cooperating to secure not merely commercial development but, by a closer understanding, the maintenance of peace at home and abroad.

It was entirely appropriate that Mr. Root should be the conspicuous figure on the occasion; for it is not too much to say that his secretaryship has witnessed the culmination of the various movements to bring Anglo-Saxon and Latin America together, nor is it too much to hope that the spirit of good fellowship generated by his policy and by his personal visit to the various countries of Latin America will result in removing misunderstandings that so frequently occur between peoples that do not come into close contact, and that the relations of the Americas may henceforth be based upon equality, justice, and a desire for the improvement of all without the sacrifice of the rights and national aspirations of any member of the Western Hemisphere.

The importance of the occasion and Mr. Root's part in bringing it about were admirably set forth by the President in the last paragraphs of his address:

> In conclusion, let me speak of another trip, made a couple of years ago by the Secretary of State, Elihu Root — the first time in our history the American Secretary of State, during his term of office, left the country to visit certain other nations. Mr. Root made the complete tour of South America, traversed Central America, and afterwards visited Mexico. He was everywhere received with the heartiest greeting, a greeting which deeply touched our people, and I wish to say once more how appreciative we are of the reception tendered him.
>
> His voyage was unique in character and in value. It was undertaken only because we citizens of this Republic recognize that our interests are more closely intertwined with the interests of the other peoples of this continent than with those of any other nations. I believe that history will say that though we have had other great Secretaries of State, we have had none greater than Elihu Root; and that though in his high office he has done much for the good of his nation and of mankind, yet that his greatest achievement has been the success which has come as the result of his devoted labor to bring closer together all the republics of the New World, and to unite them in the effort to work valiantly for our common betterment, for the material and moral welfare of all who dwell in the Western Hemisphere.

The address of the Secretary of State follows in full:

*Mr. President and Gentlemen:*

We are here to lay the corner stone of the building which is to be the home of the International Union of American Republics.

The wise liberality of the Congress of the United States has provided the means for the purchase of this tract of land — five acres in extent — near the White House and the great Executive Departments, bounded on every side by public streets and facing to the east and south upon public parks which it will always be the care of the National Government to render continually more beautiful, in execution of its design to make the national capital an object of national pride and a source of that pleasure which comes to rich and poor alike from the education of taste.

The public spirit and enthusiasm for the good of humanity which have inspired an American citizen, Mr. Andrew Carnegie, in his administration of a great fortune, have led him to devote the adequate and ample sum of three-quarters of a million dollars to the construction of the building.

Into the appropriate adornment and fitting of the edifice will go the contributions of every American Republic, already pledged and, in a great measure, already paid into the fund of the Union.

The International Union for which the building is erected is a voluntary association, the members of which are all the American nations from Cape Horn to the Great Lakes. It had its origin in the first Pan-American Conference held at Washington in 1889, and it has been developed and improved in efficiency under the resolutions of the succeeding conferences in Mexico and Brazil. Its primary object is to break down the barriers of mutual ignorance between the nations of America by collecting and making accessible, furnishing and spreading, information about every country among the people of every other country in the Union, to facilitate and stimulate intercourse, trade, acquaintance, good understanding, fellowship, and sympathy. For this purpose it has established in Washington a Bureau or office under the direction of a Governing Board composed of the official representatives in Washington of all the Republics, and having a Director and Secretary, with a force of assistants and translators and clerks.

The Bureau has established a rapidly increasing library of history, travel, description, statistics, and literature of the American nations. It publishes a Monthly Bulletin of current public events and existing conditions in all the united countries, which is circulated in every country. It carries on an enormous correspondence with every part of both continents, answering the questions of seekers for information about the laws, customs, conditions, opportunities, and personnel of the different countries; and it has become a medium of introduction and guidance for international intercourse.

The Governing Board is also a permanent committee charged with the duty of seeing that the resolutions of each Pan-American Conference are carried out and that suitable preparation is made for the next succeeding conference.

The increasing work of the Bureau has greatly outgrown the facilities of its cramped quarters on Pennsylvania avenue, and now at the close of its second decade and under the influence of the great movement of awakened sympathy between the American Republics, the Union stands upon the threshold of more ample opportunity for the prosecution of its beneficent activity.

Many noble and beautiful public buildings record the achievements and illustrate the impulses of modern civilization. Temples of religion, of patriotism, of learning, of art, of justice, abound; but this structure will stand alone, the first of its kind — a temple dedicated to international friendship. It will be devoted to the diffusion of that international knowledge which dispels national prejudice and liberalizes national judgment. Here will be fostered the growth of that sympathy born of similarity in good impulses and noble purposes, which draws men of different races and countries together into a community of nations, and counteracts the tendency of selfish instincts to array nations against each other as enemies. From this source shall spring mutual helpfulness between all the American republics, so that the best knowledge and experience and courage and hope of every republic shall lend moral power to sustain and strengthen every other in its struggle to work out its problems and to advance the standard of liberty and peace with justice within itself, so that no people in all of these continents, however oppressed and discouraged, however impoverished and torn by disorder, shall fail to feel that they are not alone in the world, or shall fail to see that for them a better day may dawn, as for others the sun has already risen.

It is too much to expect that there will not be controversies between American nations, to whose desire for harmony we now bear witness; but to every controversy will apply the truth that there are no international controversies so serious that they can not be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they can not be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.

The graceful courtesy of the twenty republics who have agreed upon the capital of the United States for the home of this International Union, the deep appreciation of that courtesy shown by the American Government and this representative American citizen, and the work to be done within the walls that are to rise on this site, can not fail to be powerful influences toward the creation of a spirit that will solve all disputed questions of the future and preserve the peace of the Western World.

May the structure now begun stand for many generations to come as the visible evidence of mutual respect, esteem, appreciation, and kindly feeling between the people of all the republics; may pleasant memories of hospitality and friendship gather about it, and may all the Americas come to feel that for them this place is home, for it is theirs, the product of a common effort and the instrument of a common purpose.

## RECENT ARBITRATION TREATIES CONCLUDED BY THE UNITED STATES

In the Editorial Comment of the April number of this JOURNAL (II, 387) attention was called to the fact that the United States had seriously taken up the problem of arbitration treaties, and that by a happy formula of the *compromis* clause the objection of the Senate, as well as the technical objection of the foreign powers, seems to have been overcome. As the nature of the *compromis* was carefully considered, as well as the constitutional and international difficulty, it seems unnecessary to do more than to refer to the editorial in question.

The American Government has not entered into an unrestricted agreement to arbitrate any and all controversies which may rise, but has limited the scope of arbitration to controversies of a legal nature, or differences relating to the interpretation of treaties, thereby excluding any differences of a purely political nature. The reason for this restriction is self-evident; matters of policy are for the Government to determine, and it is not to be supposed that a government will generally and in advance renounce the right to conduct and to control matters of policy.

The interpretation of treaties is purely a judicial question, and therefore susceptible of judicial settlement, and would doubtless have been included within the general submission of claims of a legal nature had they not been expressly specified. Differences of a legal nature may, however, be very far-reaching, and at times involve vital interest, the independence, or the honor of the contracting parties. The treaties therefore expressly exclude questions of this nature from the general treaty. Vital interests may possess a judicial element, but it is highly probable that interests termed "vital" are at bottom political, and as such properly excluded from a general convention. The same may be said of independence, for although the question of the independence of a state may arise in a controversy of a judicial nature, the existence or nonexistence of a state has been and perhaps always will be a question of international politics. Again, the honor of the two contracting states is excluded from the arbitration agreement, and this exclusion seems susceptible of justification for the twofold reason that the expression is so indefinite as to be well-nigh meaningless, and whatever its nature it is clearly not a judicial matter. And finally, the interests of third states are excluded. It may be questioned whether this exclusion is not mere surplusage, because it is as elemental as it is fundamental that a state (as well as a person) can not be bound by an agreement to which it has not been a party.

The omission of vital interests, independence, and the honor of contracting states from a general arbitration agreement has been the subject of great and persistent criticism; yet if the views expressed in the preceding paragraph are just and reasonable, it would seem that there is no basis for criticism, because the arbitration contemplated is concerned solely with the settlement of questions of a legal and therefore judicial nature. If these questions are not judicial, or are not wholly judicial, it does not seem expedient, in the present state of affairs, to submit them to the judgment of a law court. But from another point of view the criticism is ill-founded, because the treaty of arbitration is clearly good so far as it goes, and to that extent deserving of commendation. But a conclusive answer to the objection lies in the fact that these three questions are not excluded from arbitration; for the powers may at any time by a special agreement submit to arbitration a question involving any one or all of the excluded classes. Reference may be made in this connection to the Treaty of Washington of 1871 submitting the *Alabama* claims to impartial arbitration, as indicative of the practice liable to be followed when states, mutually respecting each other, are confronted with a difficulty of like or allied nature. In any case, notwithstanding its manifold advantages, arbitration is of recent origin and it is especially wise in matters of statecraft to make haste slowly.

However opinions may differ as to the wisdom or unwisdom of reserving certain matters from the scope of a general arbitration treaty, still all will agree that the negotiation of the treaties is in itself indicative of progress, and it is a subject of congratulation that the Secretary of State has devised a formula simple and easy of application to be understood by the man in the street, and to which no objections of a constitutional nature have been or can be raised. The unfortunate misunderstanding between Senate and Executive has passed away without leaving a trace, and in the recent session of Congress — to be more accurate, in the months of February, March, April, and May — the Senate of the United States had presented to it, and approved, no less than twelve arbitration treaties with the following States: France, Switzerland, Mexico, Italy, Great Britain, Norway, Portugal, Spain, Netherlands, Sweden, Japan, and Denmark. These treaties are strikingly similar. For example, they are concluded for a period of five years; they specify the Permanent Court at The Hague as the tribunal for the arbitration of legal — that is to say, judicial — questions, and they all exclude from the general agreement to arbitrate questions involving vital interests, independence, and honor of the contracting parties, as well as questions concerning the interests of noncontracting states. They likewise specify that a special agreement shall be concluded "defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal, and the several stages of the procedure." This "special agreement" is the English equivalent for "*compromis*," and the regulation of this has been the great difficulty not merely in the United States but in foreign countries.

The *compromis* clause differs somewhat in the treaties, but as far as the United States is concerned there is no variation from the original type which follows: "It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate." The internal machinery is thus specified and it seems only proper that there be a like specification on the part of the other contracting states, if they so desire. The following quotations show the nature and extent of the specifications in the various treaties: "On the part of France, they will be subject to the procedure required by the constitutional laws of France;" "on the part of Switzerland, by the Federal Council of the Swiss Confederation, with the advice and consent of the Federal Assembly;" "on the part of Spain [such special agreements] shall be subject to the procedure required by her laws;" "on the part of the Netherlands, they will be subject to the procedure required by the constitutional laws of the Netherlands;" "on the part of Sweden, by the King in such forms and conditions as he may find requisite or appropriate;" "and on the part of Denmark, by the King in such forms and conditions as he may find requisite or appropriate."

Italy, Norway, and Portugal made no reservation concerning the organ or channel to be charged with the preparation of the *compromis*, for it follows of itself that the contracting party may use any machinery sanctioned by its constitution and that it is in ordinary cases unnecessary to specify it in an international agreement.

In the prolonged discussions at the recent Hague conference, Germany, speaking for the opposition, maintained that a treaty of arbitration bound the nation to prepare the *compromis* in such a manner that in a general arbitration treaty between Germany and the United States the German Emperor would be bound to prepare the *compromis* and when he did so would bind Germany, whereas the United States would not be bound until the Senate had ratified the special agreement. It is evident that an agreement — and a *compromis* is nothing but a special agreement — must be binding upon both to be binding upon either, and the obvious method of avoiding the difficulty pointed out by Germany would be to state clearly that the *compromis* should not be binding until it was definitively accepted by both.

This line of argument evidently expresses the view of Japan, for while making no reservation regarding the special agreement, the concluding paragraph of Article II expressly says that such agreements shall be binding only when confirmed by the two Governments by an exchange of notes.

The fullest and most formal expression of this view is, however, to be found in the treaty between Great Britain and the United States. As this depends upon the phraseology of the special agreement it is necessary to quote the concluding clause of Article II: "His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence therein of the Government of that

Dominion. Such agreements shall be binding only when confirmed by the two Governments by an exchange of notes." The right of Great Britain to consult a dominion can not be questioned by the United States, and to what extent a dominion or province shall be consulted depends solely upon the internal organization and discretion of the British Government. The reservation therefore is, from an international point of view, superfluous, but it can not be doubted that it will be very pleasing to the great self-governing colonies of the British Empire. The following notes set forth the views of the contracting parties on the binding effect of the *compromis:*

BRITISH EMBASSY,
*Washington, April, 4, 1908.*

SIR: I have the honor to inform you that I have been instructed by His Majesty's principal Secretary of State for Foreign Affairs to place on record on behalf of His Majesty's Government, with reference to the general arbitration treaty, just signed by you and myself, that the final sentence of Article II has been inserted in order to reserve to both Governments the freedom of action secured to the United States Government under their Constitution until any agreement which may have been arrived at shall have been notified to be finally binding and operative by an exchange of notes. It is understood that this treaty will not apply to existing pecuniary claims nor to the negotiation and conclusion of the special treaty recently recommended by the International Waterways Commission or any other such treaty for the settlement of questions connected with boundary waters.

I shall be obliged if you will inform me of the concurrence of the United States Government in the terms of this note.

I have the honer to be, with the highest consideration, sir, your most obedient, humble servant,
JAMES BRYCE.

Hon. ELIHU ROOT,
*Secretary of State.*

DEPARTMENT OF STATE,
*Washington, April, 4, 1908.*

EXCELLENCY: In signing with you to-day the general arbitration treaty which has been negotiated between our respective Governments, I have the honor to acknowledge and take due cognizance of your note of this day's date whereby you inform me that you are instructed by His Majesty's principal Secretary of State for Foreign Affairs to place on record on behalf of His Majesty's Government, with reference to said treaty, that the final sentence of Article II has been inserted in order to reserve to both Governments the freedom of action secured to the United States Government under their Constitution until any agreement which may have been arrived at shall have been notified to be finally binding and operative by an exchange of notes.

The Government of the United States in turn declares that its understanding of the final sentence of Article II, aforesaid, is that which you set forth on behalf of His Majesty's Government.

> I also take note of and concur in the understanding expressed in your note that the treaty we have just signed will not apply to existing pecuniary claims, nor to the negotiation and conclusion of the special treaty recently recommended by the International Waterways Commission, to any other such treaty for the settlement of questions connected with boundary waters.
>
> I have the honor to be, with the highest consideration, your excellency's most obedient servant, ELIHU ROOT.
>
> His Excellency The Right Honorable JAMES BRYCE, O. M.,
> *Ambassador of Great Britain.*

Another reservation in Ambassador Bryce's note should not be overlooked, because pecuniary claims are not to be submitted to the Hague Tribunal, but to a specially constituted commission, and the intricate questions concerning the international boundary between Canada and the United States are reserved for the consideration of a tribunal undoubtedly to be composed of experts and to meet within the disputed locality.

It is pleasing to turn from the treaties with monarchies to the treaty with our republican neighbor, Mexico, for in the matter of the *compromis* no embarrassment exists. For example: "It is understood that such special agreements shall be made by the Presidents of both contracting countries by and with the advice and consent of their respective Senates."

Article III of the treaty is very important; for, lest the first article of the treaty might seem to question the arbitration clause of the treaty of Guadalupe Hidalgo (1848), the clause in question is expressly confirmed and continued in effect. As the articles are fundamentally important they are quoted in their entirety:

> The foregoing stipulations in no wise annul, but on the contrary define, confirm and continue in effect the declarations and rules contained in Article XXI of the treaty of peace, friendship and boundaries between the United States and Mexico signed at the city of Guadalupe Hidalgo on the second of February, one thousand eight hundred and forty-eight.

Article XXI mentioned in the above clause reads:

> If unhappily any disagreement should hereafter arise between the Governments of the two Republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said Governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations. And

> if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one Republic against the other, until the Government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

It is thus seen that the negotiation of twelve treaties of general arbitration is, to use the happy phrase of our Secretary of State, "continual progress toward making the practice of civilized nations conform to their peaceful professions."

## SETTLEMENT OF THE CANADIAN QUESTIONS

When Mr. Root took charge of the international relations of this Government as Secretary of State less than three years ago, not the least important of the many matters awaiting his attention was a group of unsettled questions with Great Britain, involving various matters of difference between the United States and Canada and Newfoundland, most of which had been the subject of controversy for a decade at least — some for over half a century — and almost any one of which gave promise, if left longer unadjusted, of developing into a fruitful source of international irritation.

The negotiations for the settlement of these questions which were then initiated by Mr. Root and have since been carried on by him have already produced definite results of great value, and what has actually been accomplished gives assurance that a satisfactory settlement of all of them may now be expected. Final agreements have already been reached with respect to four of these questions, as is shown by the boundary treaty, the boundary-waters fisheries treaty, the conveyance of prisoners, and the wrecking and salvage treaty, which were recently entered into with Great Britain and are printed in the Supplement to this number of the Journal at pages 303–325. Moreover, the general arbitration treaty with Great Britain, signed on the 4th day of April, 1908, which is printed in the Supplement at page 298, opens the way for the settlement of at least one other of these questions — the Newfoundland and Canadian fisheries controversy — and a basis of settlement, it is understood, has been reached for several of the others. The occasion seems to be appropriate, therefore, for a brief outline of the subject-matter and recent history of the questions referred to.

Ten years ago an attempt was made to reach a final adjustment of all the unsettled questions with Canada and Newfoundland then pending, and to that end the Joint High Commission was constituted in 1898 by the United States and Great Britain and empowered to agree upon a treaty or treaties adjusting all such questions, a list of which was then formulated as follows:

1st. The questions in respect to the fur seals in Bering Sea and the waters of the North Pacific Ocean.

2d. Provisions in respect to the fisheries off the Atlantic and Pacific coasts and in the inland waters of their common frontier.

3d. Provisions for the delimitation and establishment of the Alaska-Canadian boundary by legal and scientific experts if the commission shall so decide, or otherwise.

4th. Provisions for the transit of merchandise in transportation to or from either country across intermediate territory of the other, whether by land or water, including natural and artificial waterways and intermediate transit by sea.

5th. Provisions relating to the transit of merchandise from one country to be delivered at points in the other beyond the frontier.

6th. The question of the alien-labor laws applicable to the subjects or citizens of the United States and of Canada.

7th. Mining rights of the citizens or subjects of each country within the territory of the other.

8th. Such readjustment and concessions as may be deemed mutually advantageous of customs duties applicable in each country to the products of the soil or industry of the other, upon the basis of reciprocal equivalents.

9th. A revision of the agreement of 1817 respecting naval vessels on the lakes.

10th. Arrangements for the more complete definition and marking of any part of the frontier line, by land or water, where the same is now so insufficiently defined or marked as to be liable to dispute.

11th. Provisions for the conveyance for trial or punishment of persons in the lawful custody of the officers of one country through the territory of the other.

12th. Reciprocity in wrecking and salvage.

The proceedings of the Joint High Commission have not been made a matter of public record. It has been authoritatively stated, however, that during the course of its negotiations, which extended over a period of six months or more, much progress was made toward an agreement on several of these questions, but failing to agree upon any adjustment of the Alaskan boundary question it was found impossible to reach a definite agreement on any of the others under consideration, and the Joint High Commission finally suspended its negotiations in March, 1899, and has never since reconvened. Thereafter, under the treaty of January 24, 1903, the Alaskan boundary question was finally settled by the decision of the international tribunal constituted by that treaty, leaving the way open for a renewal of negotiations with respect to the other questions, but the disposition on the other side has always been to make the settlement of each one of them dependent upon the satisfactory and simultaneous adjustment of all the others, which created a most unfavorable situation for making much progress on any of them. Several additional questions of difference also developed after the adjournment of the Joint High Commission, including particularly the use of the waters of the Niagara River for power purposes, and the diversion of the waters of the St. Mary's and Milk rivers for irrigation purposes and the construction of log booms in the St. John River and the overflowing of lands at several points along the boundary by the elevation of the level of boundary waters resulting from the damming of outlets, and generally the use and diversion, for sanitary, domestic, irrigation, navigation, and power purposes, of boundary waters and waters tributary thereto or flowing across the boundary throughout the entire extent of the common frontier between the United States and Canada. Such in brief was the situation when the direction of our foreign affairs came into the hands of our present Secretary of State.

The adherence of the Canadian Government to its former position, that before opening formal negotiations for the settlement of any of these questions they desired to be assured of the probability of reaching an agreement on all of them, made it impossible to take up any one of the questions independently of the others, and if any progress was to be made it obviously devolved upon the United States at the outset to define its position upon each of the pending questions as a basis for a comparison of views. The difficulty of defining with accuracy for this purpose the position of the United States on each of some sixteen or more questions, many of which had been the subject of active controversy at different periods of our history and under varying conditions, may well be imagined, and Canada's insistence that the negotiations be conducted on this basis may explain to some extent why the final settlement of these questions had been so long postponed.

It also appears that on account of the conditions under which the negotiations were undertaken, and in order to facilitate their progress, it further devolved upon the United States to prepare a series of draft treaties embodying the terms of settlement upon which the United States was willing to agree with respect to the more important questions under consideration.

In view of the situation above outlined, it is evident that the burden of the work of preparing the terms of settlement for these questions and of putting them into treaty form fell upon the United States, and the number, character, and scope of the questions under consideration will give some suggestion of the amount of research and investigation which was necessary in preparing for and carrying on these negotiations. The final outcome rarely discloses the full measure of the preliminary work which enters into an international agreement, and this is no doubt true in this instance, nevertheless an examination of the terms of the three treaties already adopted covering four of these questions will show that their preparation must at least have included an extensive examination of the history of each of these questions and of the attitude thereon in the past not only of the United States but of Canada and Great Britain as well, including the tentative agreements arrived at on some of them by the Joint High Commission, together with the adoption of such revisions and additions as later developments and changed conditions made necessary, and similar preliminary work has doubtless entered into the preparation of the other treaties which are still pending.

In order to assist in the work involved in the preparation of these treaties and of the material necessary for carrying on the negotiations, Mr. Chandler P. Anderson, whose experience as secretary on the part of the United States for the Joint High Commission and as one of the counsel for the United States before the Alaskan Boundary Tribunal and as the secretary for the Bering Sea Claims Commission had specially qualified him for that work, was retained as special counsel in these matters.

Both Governments are certainly under great obligation to the Secretary of State and Mr. Anderson for undertaking the extensive and arduous negotiations which were necessary for breaking the deadlock so long existing with respect to the settlement of these questions, and the result of which has been to secure the settlement of some and open the way for the final adjustment of all the other pending questions of difference between the United States and Canada, thus at the same time removing the occasion and the possibility of serious friction between the two countries.

## OUR NORTHERN BOUNDARY

After the lapse of one hundred and twenty-five years since the northern boundary of the United States was first defined by treaty with Great Britain and of over sixty years since our last treaty defining this boundary was entered into, it would have seemed to be a safe assumption that if anything further was necessary to make definite and certain the location of such boundary appropriate action to that end would long since have been taken by the two Governments. It will doubtless be somewhat surprising, therefore, to those who have not had occasion to look into the matter to find that several important sections of the boundary are insufficiently defined by treaty description, or on treaty charts, or by monuments along its course, as the case may be, and that owing to the inaccuracy of many of the earlier treaty charts and the loss of some of the duplicate originals filed with this Government, it is of considerable importance that the entire line be marked on accurate modern charts having a treaty value. That the situation is as above stated is disclosed by the treaty recently entered into with Great Britain for the more complete definition and demarcation of the international boundary between the United States and Canada throughout its entire extent from the Atlantic to the Pacific. (Supplement, p. 306.)

It appears from the provisions of this treaty that the boundary from the mouth of the St. Croix River to the Atlantic Ocean, extending through Passamaquoddy Bay and about twenty miles in length, has never been defined by treaty or laid down on treaty charts, and that the consequent uncertainty as to its location has brought into dispute the ownership of a small island and of certain fishing grounds in that bay. It further appears that the location of the line throughout the entire extent of the St. Croix River has never been laid down on treaty charts or monumented along its course, although it is defined by treaty as running through the middle of the river. A boundary through the middle of a river, however, has the accepted meaning of through the middle of the main channel of the river, and, as this river is full of small islands of more or less importance which frequently divide the river into several channels, there is considerable uncertainty as to the exact location of the line at many points and consequently as to the nationality of several of these islands. The portion of the line extending from the source of the St. Croix River to the St. Lawrence River, bounding on the north the States of Maine, New Hampshire, Vermont, and New York, is described with considerable particularity by existing treaty provisions and has been laid down on charts and the land portion of it has been accurately marked by monuments, but many of these monuments have been lost or displaced and the greater part of this section of the boundary which runs through waterways has never been monumented, although its general course in relation to most of the important islands in such waterways has been determined by the erection of monuments on such islands, indicating their nationality. The course of the boundary from the St. Lawrence River through the Great Lakes is described by existing treaty provisions as running through the middle of the boundary lakes and their connecting waterways, and as the resultant line is necessarily a curved line, and is so indicated on the existing treaty charts, it is almost impossible to ascertain with any certainty its physical location on the surface of the waters. It has therefore been found necessary in the new treaty to provide for the adoption, in place of such curved line, of a series of connecting straight lines to be defined by distances and courses and following generally the course of such curved line, but conforming strictly to the description of the boundary in existing treaty provisions.

From the mouth of the Pigeon River at the western end of Lake Superior to the northwesternmost point of the Lake of the Woods the course of the boundary is defined with some detail by existing treaty provisions, but no portion of it has ever been actually located or monumented along its course by joint action of the two Governments, and no joint survey of its course has been made since the original survey under the direction of the commissioners appointed under Article VII of the treaty of 1814, although its location is roughly indicated on maps prepared from that survey and afterwards adopted as treaty maps by the treaty of 1842, which maps, however, are not sufficiently accurate in detail to determine its exact location at several points.

From the northwesternmost point of the Lake of the Woods the course of the boundary under existing treaty provisions runs due south to the forty-ninth parallel and thence westerly along that parallel to the middle of the Gulf of Georgia. This portion of the boundary east of the Rocky Mountains was surveyed and laid down on treaty charts and monumented along its course by a joint commission appointed for that purpose in 1872. Many of these boundary monuments, however, have been obliterated and it is necessary now to have such monuments restored and to establish additional monuments wherever required under modern conditions. It appears that the portion of the line west of the Rocky Mountains has recently been resurveyed and remonumented by a joint commission appointed by the two Governments, and the results of the work of this commission are adopted by this treaty, special provision being made for the demarcation of the line on accurate modern charts having a treaty value. The last section of the line extends from its intersection with the forty-ninth parallel of latitude in the Gulf of Georgia through Fuca's Straits to the Pacific Ocean. Here the accurate reproduction on modern charts of the line as already defined and marked under existing treaty provisions is all that is required.

Under the conditions above outlined it is evident that at many points along the course of the boundary it would be impossible to determine with any certainty its exact location. In so far as it represents any division between the United States and Canada in their feelings of mutual friendship and good-neighborliness, it is much to be desired that it should always remain an imaginary line, as it has happily been called, but as a boundary dividing contiguous governmental jurisdictions something more substantial than an imaginary line is required, and, if disputes are to be avoided, the wisdom of more completely defining and marking the entire boundary is obvious.

The new treaty is intended to secure this result, and its comprehensive and thorough treatment of the subject is admirable. It provides that a joint commission or commissions shall be appointed for the purpose of accurately ascertaining the location of the existing boundary throughout its entire extent, from the Atlantic to the Pacific, as established by former treaty provisions and as marked on treaty charts and by monuments along its course, special provision being made for the ascertainment of the location of such portions of the line as have not already been so established and marked, and having ascertained its location the commissioners are required to place monuments or other suitable boundary marks along its course, restoring lost or damaged monuments and erecting such additional monuments as may be desirable, and they are also required to lay down its course on accurate modern charts, duplicate original sets of which are to be filed with each Government; the commissioners are further required to file with each Government joint reports describing in detail the location of the line and the monuments or other boundary marks established along its course; and it is agreed that the line so marked and defined by them shall be taken and deemed to be the international boundary.

The boundary is appropriately divided by the treaty into eight different sections, each one of which is dealt with in a separate article containing a recital of the several treaty provisions and the proceedings thereunder which define and fix its location, the extent of each section being determined by its relation to such treaty provisions and by the character of the future proceedings which are to be taken for the more complete definition and demarcation of such section of the boundary.

Thus, it will be seen that in addition to its primary value, as a preventative of boundary disputes in the future, this treaty has a secondary value of considerable importance, in that, by the method of arrangement and treatment above referred to, it furnishes an authoritative outline or synopsis of the history of the establishment of our entire northern boundary, showing with respect to each section the various different proceedings which have been taken from its inception to its final completion.

### THE BOUNDARY–FISHERIES TREATY

A most interesting illustration of the extent of the jurisdiction of the treaty-making power of the United States is presented by the treaty recently entered into with Great Britain for the uniform regulation of the fisheries in the contiguous boundary waters between the United States and Canada, a copy of which treaty will be found in the Supplement to this number of the JOURNAL at p. 322.

This treaty provides that the times, seasons, and methods of fishing in certain specified waters contiguous to the boundary between the United States and Canada and the nets, engines, gear, apparatus, and appliances which may be used therein shall be fixed and determined by uniform and common international regulations, restrictions, and provisions, which are to be prepared by an international fisheries commission to be appointed for that purpose, and the two Governments engage to put into operation and to enforce by legislation and executive action, with as little delay as possible, such regulations, restrictions, and provisions, with appropriate penalties for all breaches thereof.

On the American side of the boundary, the waters containing the fisheries referred to are wholly within the borders of the several boundary

States, and it has been held in an opinion rendered by Attorney-General Griggs in 1898 (Opinions of Attorney-General, Vol. XXII, p. 214), and this view presumably prevails to-day, that on account of the division of powers between the Federal and State governments under the Constitution the regulation of the fisheries in these boundary waters within the territorial limits of the several States is a subject of State rather than of Federal jurisdiction, and that Congress has no authority, in the absence of a treaty giving such authority, to pass laws to regulate or protect the fisheries in such waters.

Notwithstanding this exclusive jurisdiction of the several boundary States over these fisheries in the absence of a treaty, the right of the treaty-making power to take jurisdiction over these fisheries is recognized and supported in this opinion of the Attorney-General, and such power has been exercised in full measure in entering into the present treaty. Under the provisions of this treaty, the fishery regulations adopted and enforced by the individual boundary States are superseded and displaced, in so far as they conflict, by regulations to be adopted by an international commission and to be enforced by the Federal Government, if necessary, thus substituting for the authority of the individual boundary States the authority of an international commission backed by the Federal Government and extending the jurisdiction of Congress to the regulation of these fisheries, which in the absence of this treaty provision would be entirely beyond the control of Congress.

This treaty, therefore, recalls, and it is to be hoped will finally settle, the question of whether or not the treaty-making power has jurisdiction to deal with matters which are not among the enumerated powers delegated by the Constitution to Congress, and to extend the jurisdiction of Congress over such matters when congressional legislation is necessary to carry out treaty stipulations, which has been the subject of much discussion in the past. Those commentators on the treaty-making power who are inclined to maintain States' rights at the expense of the effectiveness and the national character of the Federal Government in its foreign relations have always questioned the right to exercise so extensive a power by treaty under any circumstances. By entering into this treaty, however, the executive branch of the Government and the Senate, which together constitute the treaty-making power, have asserted in the most emphatic manner the possession of this power, and unquestionably the weight of authority found in judicial decisions and in the opinions of those entitled to speak with authority on the subject, and in the precedents already established, sustain beyond the possibility of any reasonable doubt the right of the treaty-making power to exercise such jurisdiction to the fullest extent, provided, always, that the treaty is designed to promote the general welfare and relates to matters clearly of an international character which either can not be dealt with so effectively by the individual States or not at all except by treaty.

An examination of the fisheries question and the conditions surrounding it will show that the exercise of this power in the present case arises from and is based upon the international character of such fisheries and the interest of the nation at large in having them protected and preserved on account of their great value as a food supply, and from the impossibility, as shown by practical experience, of adequately providing for their protection and preservation except by regulations established by means of an international agreement, as here proposed, under Federal authority.

The importance of adopting uniform restrictive regulations for the protection and preservation of these fisheries and of establishing fish hatcheries to increase the supply of food fish has long been recognized on both sides of the boundary. The whole subject was examined and reported on by a joint commission of two experts appointed in 1892 by the United States and Great Britain, and their report establishes conclusively the necessity not only of revising and adding to the protective regulations then in force and of providing methods for increasing the supply of food fish, but also of securing uniformity and harmony in the application and enforcement of such regulations and methods in the waters of Canada and of the several boundary States on the American side of the line. It appears that under existing conditions the differences in the method of dealing with the fisheries and of enforcing the regulations adopted in the several different States and in Canada have led to mutual recriminations and complaints, attended by considerable friction and some violence.

Efforts have been made to secure uniform action among the several States on the one side and the Dominion of Canada on the other along the lines recommended in this report, but without success. Concurrent legislation by the several States and Canada has been found inexpedient. Experience has shown that it would be a practical impossibility to secure such legislation, and even if it could be secured there would be no guaranty of any degree of permanency. It would of course be permissible, if the consent of Congress could be secured, for the several States to avail themselves of the privilege reserved to them under the Constitution of entering into an agreement on this subject with the Dominion of

Canada, but our history furnishes no precedent for an agreement between a State and a foreign government, and although such a course might be appropriate in this case, yet undoubtedly it would be even more difficult for the several States and the Dominion of Canada to reach an agreement on these questions and to secure congressional approval of it, than it would be to secure uniform regulations among the several States and in Canada by concurrent legislation independently of any such agreement. Moreover, even if such an agreement became effective, the situation would hardly be more satisfactory in the end than under concurrent legislation, for so long as the regulations on the American side were under State control, the difficulties attendant upon their enforcement would be largely the same, whether the Canadian regulations were concurrent or divergent. The inherent difficulty with any arrangement leaving the control of these fisheries to the several border States is that the enforcement of fishery regulations in the contiguous waters is likely to involve the authorities on either side in conflict with the citizens of the other country, or otherwise raise international questions which the several States have no power to deal with. The several boundary States seem to be entirely willing to turn to the Federal Government for relief in this matter, and their fisheries commissioners and in more than one instance their legislatures have expressed the view that if these fisheries are to be preserved they must be subjected to Federal regulation, and in this view the commercial interests in the Great Lakes fisheries have fully concurred.

It is evident, therefore, that nothing short of the adoption of regulations for the protection and preservation of these fisheries through the operation of the treaty-making power would furnish a complete and permanent solution of the difficulties presented, and if the present treaty accomplishes this result it will serve as a conspicuous example of the wisdom and foresight of the framers of the Constitution in conferring upon the treaty-making power the extensive jurisdiction which has been exercised in this case.

## RUSSIAN-JAPANESE FISHERIES CONVENTION OF JULY 15 (28), 1907

In pursuance of Article XI of the Treaty of Portsmouth, Russia in July, 1907, reached an understanding with Japan, granting to subjects of the latter State fishing rights along the coast of Russian possessions in the seas of Japan, Okhotsk, and Bering.[1] This convention, with the explanatory protocol and reciprocal declarations annexed thereto, embodies an agreement of unusual significance.

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[1] For the text of this article see U. S. For. Rel., 1905, 826.

The text of the fisheries convention of 1907 is contained in the current number of the Supplement of this JOURNAL.

The territory concerning which provision is made extends from the Korean boundary to Bering Straits. The extent of this coast line, without allowing for the indentations of the Asiatic mainland, corresponds roughly to that of North America included between northern Labrador and the island of Cuba. Japanese subjects are given the right to —

> Fish, catch, and prepare all kinds of fish and aquatic products except fur seals and sea otters, along the Russian coasts of the seas of Japan, Okhotsk, and Bering, with the exception of the rivers and inlets.[2]

With minute care it is provided in the annexed protocol what particular inlets are reserved. These include certain wide bays.[3] Among them may be noted Anadyr Bay, "as far as a straight line drawn from Cape Saint Basilus to Cape Guek." These headlands are about one hundred miles apart. Saint Croix Bay, "as far as the parallel of Cape Meetchken," is also named. On the northern coasts of the Sea of Okhotsk it is provided that those bays fall within the exception which "cut into the continent a distance three times as great as the width of their entrance." Again, it is declared that for strategic reasons fishing shall be prohibited to Japanese as well as other foreigners within the limits of the territorial waters of certain bays, which include among their number Peter the Great Bay, from Cape Povorotony to Cape Gamov. These headlands are about one hundred miles apart.[4]

It can not be said that the Russian claim of control over fisheries within any of the reserved inlets is excessive. At the present time the principle is generally recognized that the right of a state to control a particular bay depends, not upon the distance between headlands at the entrance, but rather upon the geographical configuration of the coast of which the inlet or bay forms an indentation, and over which the state exercises solitary dominion.[5]

The right granted to Japanese subjects consists in the privilege of leasing at public auction so-called fishing tracts.[6] Fishing, however, for whale or cod, or other fish which can not be taken within special tracts, is given to such subjects on sea-going vessels provided with special permits.[7] Within the licensed tract the lessees are given free use of the coast for numerous purposes, such as that of making repairs, salting, drying, and preparing of fish, as well as of erecting cabins and storehouses.[8] Furthermore, no restriction is made as to the nationality of the person to be employed by the lessees,[9] except in tracts in the "Liman of the Amour."[10]

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[2] Article I.

[3] See Article I of protocol.

[4] *Id.*

[5] See case of *The Alleganean*, Second Court of Commissioners of Alabama Claims, Stetson v. United States, No. 3993, Class I; Moore, Inter. Arbitrations, IV, 4332–4341.

Compare Direct United States Cable Company v. Anglo-American Tel. Co. (1877), L. R. 2 App. Cases, 394; Reg. v. Cunningham, Bell's C. C., 72; Mortensen v. Peters, 8 Fraser, 93.

Russia agrees to accord equal treatment to Japanese and Russian subjects regarding imposts or taxes levied on the fishing industry;[11] and expressly contracts not to collect duties on fishing products intended for export to Japan.[12] Russia retains the right to make necessary laws and regulations concerning the protection and culture of fish, subject to

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See also A. H. Charteris, "Territorial Jurisdiction in Wide Bays," Proceedings of International Law Association, twenty-third report, 1906, 103.

The opinion of Mr. Bates, umpire, in the case of *The Washington*, under convention between the United States and Great Britain of February 8, 1853, in denying that the Bay of Fundy was a British bay adverted to the fact that one of the headlands thereof was in the United States. (Moore, Inter. Arbitrations, 4342, 4344.) The precise problem before the umpire was whether that body of water was a "bay" within the meaning of the word as used in the treaties of 1783 and 1818. It is to be observed that the issue between the United States and Great Britain with reference to the proper signification of the term "bays," as employed in article 1 of the treaty of 1818, is unrelated to the question as to the extent of bays over which a state may, according to international law, exercise control.

Compare article 1, fishery convention between Great Britain and France of 1867, N. R. G., XX, 465; Art. II of North Sea Convention, May 6, 1882, N. R. G., 2d series, IX, 556, 557; sec. 1, art. 2, treaty between Spain and Portugal, Oct. 2, 1885, N. R. G., 2d series, XIV, 77, 78.

See also resolution of the Institute of International Law (1894–1895) with reference to the extent of control which a state should be permitted to exercise over adjacent waters, and particularly the preamble and article 3, with reference to bays. Annuaire, XIII, 328, 329.

See also communication of Mr. Olney, Secretary of State, to Mr. de Weckerlin, Dutch Minister, February 15, 1896. Ms. Notes to the Netherlands, VIII, 359; Moore Inter. Law Dig., I, 734.

[6] Article II.

[7] *Id.*

[8] Article III.

[9] Article VI.

[10] Reciprocal declarations, Article II.

[11] Article IV.

[12] Article V.

the stipulation, however, that their operation shall apply equally to the subjects of the two Contracting States, and that the Government of Japan shall be notified, six months beforehand, of newly enacted laws.[13] Japan, on her part, agrees not to levy import duties on fishing products taken on the Russian coast and the Amour.[14]

The procedure to be followed by Japanese fishermen is carefully specified. A certificate of navigation to and from the Russian fisheries is to be issued by the Russian consuls in Japan, on the presentation of documents showing the right of the fishermen to lease a particular tract, and giving fullest information as to the purpose of the voyage, the persons interested therein, as well as the individuals and cargo on board the vessel. A fishing vessel, upon receipt of its certificate, may only enter and call at points named therein. Such vessel is, however, given access to Russian ports having a custom-house.[15] When the vessel is in pursuit of cod or whale, it is obliged to call provisionally at a Russian port specially designated, where the authorities will issue a special permit to fish.[16] All Japanese steam vessels must be provided with a ship's journal, translated into Russian or English. Sailing vessels also must, as far as possible, comply with this regulation.[17]

The convention is to remain in force for twelve years, and is to be renewed or modified at the end of every twelve years thereafter.[18] The duration of the leased fishing tracts is from one to five years, according to a specified classification.[19]

Notwithstanding the extent of the area within which fishing tracts may be secured, it must be apparent that the grantor retains largest powers of regulation and control of the industry within its waters. Russia yields no permanent right to Japan or its subjects, but simply agrees, within a stated period, to grant licenses of limited duration.[20]

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[13] Article IX, and Article IV of protocol.

[14] Article XII.

[15] Article XI of protocol.

[16] *Id.*

[17] Reciprocal declarations, Article V.

[18] Article XIII.

[19] Article VIII of protocol.

Provision is made that in case a lease shall not have expired at the expiration of the treaty, the former shall remain valid until the end of the term, irrespective of the decision of the High Contracting Parties as to the convention itself (Article IX of protocol).

[20] In this respect the rights acquired by Japan contrast sharply with those which, by the provisions of Article I of the treaty of October 20, 1818, between the United States and Great Britain, are declared to belong to American citizens.

Should war unfortunately again disturb the friendly relations between the High Contracting Parties, the convention of 1907 would not withstand the shock.

## MACEDONIAN RAILWAYS AND THE CONCERT OF EUROPE

The announcement by Baron Aehrenthal, on January 27, of the proposal to construct a railway, under Austro-Hungarian auspices, from Uvac, the southern terminus of the Bosnian system, through the Sandjak of Novibazar to Mitrovitsa, the northern terminus of the Salonika line, opens a new chapter in the history of the Near Eastern Question. In 1897 Austria-Hungary and Russia substituted for their traditional rivalry in the Balkan Peninsula an *entente* whose purpose was the maintenance of the political *status quo*. The emergence of the Far Eastern Question was Russia's reason for coming to an agreement in the Near East; while Austria was impelled to consent to a policy of inaction by her serious domestic troubles. These causes have now largely disappeared and the old rivalry is again revived. It is true that the proposal to build the Novibazar railroad is not strictly a breach of the *entente,* since only the political, not the economic, *status quo* was guaranteed; nor is Austria-Hungary probably transcending her rights under the Treaty of Berlin, which confers upon her the privilege of building roads in Novibazar, although there is a difference of opinion as to whether the term *route* employed in that instrument may be interpreted as including railroads or should be confined to highways; nevertheless the *entente* is shattered. In spite of Baron Aehrenthal's insistence on the purely economic character of the road, the fact that it is to be narrow gauge and that all goods shipped from Central Europe will, therefore, require to be handled twice en route, as well as its greater length, makes it certain that it can never compete on equal terms with the existing line via Belgrade. On the other hand, its strategic importance, in giving Austria-Hungary a railway connection with Salonika, not liable to interruption by a hostile Servia, can not be gainsaid.

The Russian press at once accepted Baron Aehrenthal's announcement as equivalent to a change of policy, and the Russian Government has virtually acknowledged that the *entente* is at an end, by actively supporting the proposal for a Danube-Adriatic railroad, which Servia has long sought. This road, after traversing Roumania, will probably find its northeastern terminus at Odessa, thus bringing Russia herself into direct railway connection with the Adriatic. On March 10 the Servian minister presented a note to the Porte asking authorization for the construction of the Macedonian section of this line. Far more serious difficulties are presented, both to the engineer and to the diplomatist, by this line than by the Novibazar road. Two routes are discussed. The shorter, and that which would penetrate the richer country, crosses Montenegro and terminates at Antivari, which is an excellent port, but unfortunately subject to certain rights of occupation by Austria-Hungary under the Treaty of Berlin. One of the manifest strategic advantages of the Danube-Adriatic line would be the linking together of the Slav states, but this probably constitutes a potent reason why Turkey may refuse any concession through Macedonia which would secure this object. The alternative route avoids Montenegro entirely and terminates at the Macedonian port of San Giovanni di Medua, whose harbor is shallow and insecure and the improvement of which would be very costly. Much stronger policing would also be required for this route, against Albanian attack, than for the other. The Sultan might conceivably consent to the San Giovanni route, as it would really possess considerable strategic value for Turkey; but the prospect of commercial success is not so certain and the financing of the undertaking might prove difficult. It is, however, quite possible that Austrian and German influence at Constantinople may, in the present circumstances, be employed to block every railroad project which would have for its ultimate effect the development of a strong Slav barrier to the *Drang nach Osten.*

Other railroads in the Balkan Peninsula are being just now seriously mooted, including one which will connect Salonika directly with the Adriatic, either at Durazzo or Avlona, and one running south from Sofia to the Ægean. Athens is also to be brought into connection with the European system by the completion of the Larissa-Salonika section of road.

An era of railroad development is, in all probability, about to open for the Balkans which will go far toward solving the problems of disorder and lack of security in Macedonia. The rupture of the Austro-Russian *entente* also offers some prospect of constitutional reforms in Macedonia, which seemed utterly hopeless so long as the two powers chiefly interested pursued a common policy of inaction.

## THE BALTIC AND THE NORTH SEAS

On November 2, 1907, Great Britain, France, Norway, Germany, and Russia, "animated by the desire to secure to Norway, within her present frontiers and with her neutral zone, her independence and territorial integrity, as also the benefits of peace" (preamble), concluded a treaty to this effect, by the terms of which Norway undertook not to cede any portion of its territory to any power, whether the cession in question should be based upon occupation or on any ground whatsoever. In consideration of this promise on the part of Norway, the British, French, German, and Russian Governments recognized and undertook to respect the integrity of Norway, and further bound themselves that if the integrity of Norway is threatened or impaired by any power whatsoever the Governments in question bind themselves, on the receipt of a previous communication to this effect from the Norwegian Government, to afford to that Government their support by such means as may be deemed the most appropriate with a view to safeguarding the integrity of Norway. This obligation was undertaken for a period of ten years. (For a further discussion of the treaty and its antecedents, see Editorial Comment, II, 176, and for the text of the treaty, see Supplement (the present number, p. 267).

The importance of this treaty is hard to overestimate, because the separation of Norway from Sweden led not a few political prophets to believe that the new Kingdom might fall a prey to its stronger neighbors. Its integrity is guaranteed by the great and interested powers, and one less cause of war exists. But if Norway were weak, Sweden was weakened by the separation from Norway, and as Sweden has gradually been absorbed by Russia, it was feared, perhaps unjustly, that the process of the past might continue in the future until the absorption of Sweden became, in the language of diplomacy, a *fait accompli*.

A guaranty of integrity may be looked upon as a confession of weakness, and it may be humiliating to a nation which has long been independent and played a conspicuous part in the world's affairs to confess that it needs to have its integrity assured. The new-born Norway may court such a guaranty; the country of Gustavus Adolphus dare not. Hence, all nations of Europe bordering upon the Baltic entered into a solemn agreement on the 23d day of April, 1908, based upon a desire to strengthen the friendship between them and "to contribute thereby to the maintenance of universal peace," "to preserve intact the rights of the Emperor of Germany, King of Prussia; of the King of Denmark; of the Emperor of Russia, and of the King of Sweden in whatever concerns their continental or insular possessions" within the Baltic regions. The maintenance of the *status quo* is thus the object of this solemn agreement, and if the territorial status be threatened the Signatory Powers agree to confer as to the measures to be taken in order to maintain the existing status.

The treaty is to be taken in connection with a memorandum signed the same day, which on account of its brevity is quoted in full:

> At the moment of signing the declaration of this day's date, the undersigned, by order of their respective Governments, consider it necessary to state that the principle of the maintenance of the *status quo* as laid down by the said declaration applies solely to the territorial integrity of all the existing possessions of the High Contracting Parties in the region bordering upon the Baltic Sea, and that consequently the declaration can in no case be invoked where the free exercise of the sovereign rights of the High Contracting Parties over their above-mentioned possessions is in question.

But the date of April 23, 1908, is likely to be memorable for another declaration; for on the same day representatives of Germany, Denmark, France, Great Britain, the Netherlands, and Sweden, moved by a neighborly spirit and a desire to contribute to the general peace of the world, declared their firm resolution to "preserve intact, and mutually to respect, the sovereign rights which their countries at present enjoy over their respective territories" in or bordering upon the North Sea. In the memorandum signed the same day by the representatives of the five contracting powers the North Sea is considered "to extend eastward as far as its junction with the waters of the Baltic."

An examination of these two documents shows that Sweden and Denmark enjoy a double guaranty of their integrity, for they are parties to each agreement. It further appears that Germany, as a contracting party to both, pledges its faith to the maintenance of the *status quo* within the North Sea as well as within the Baltic. The absorption of Denmark, begun in recent years by the annexation of Schleswig-Holstein, seems to be arrested by mutual agreement, and the little country of Holland, the home of Grotius, seems unlikely to be absorbed by its strong neighbors on the south and east. A further examination of these two remarkable declarations shows that Norway, whose independence was guaranteed by the treaty of November 2, 1907, is considered as neutralized, for it is treated on an equality with Belgium, a neutralized state. Neither is a party to the recent declarations.

In a word, if man thought as much of his immortal soul as he does of his stomach, and if nations thought as much of right and justice as they do of their possessions, the world would be at peace; and when we consider how simply and quietly these agreements were reached, that they have not created even a ripple of excitement, that their very existence is only known to the few, we see how easy it would be for neighboring nations to guarantee their territorial possessions and thus by a stroke of the pen to make war an outcast. Every lover of his kind must hail with delight these declarations of peace on earth, good will to men.

# CHRONICLE OF INTERNATIONAL EVENTS

### WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

*November, 1907.*

1 NETHERLANDS. Law approving convention signed at Berne September 19, 1906, modifying the provisions of the international convention, signed at Berne October 14, 1890 (*State Papers*, 82: 771, 796; *N. R. G.*, 19:289), the arrangement signed at Berne July 16, 1895, and the additional convention signed at Paris June 16, 1898. Railway freight transportation. Signatory powers: Germany, Austria, Hungary, Belgium, Denmark, France, Italy, Luxemburg, Netherlands, Roumania, Russia, Switzerland. *Staatsb.*, 1907, No. 280. *See November 2, 1907.*

5 BOLIVIA—PERU. Protocol signed at La Paz establishing manner of effecting renewal of diplomatic relations between Bolivia and the Holy See, through the mediation of Peru. *B. del ministerio de rel. ext.* (Lima), 6:18.

6 BRAZIL—VENEZUELA. Brazilian Decree No. 1768 sanctioning two protocols signed at Caracas November 9, 1905. The first ratifies the demarcation in 1880 of boundary from Cucuy rock to Mt. Cupí; the second determines that a mixed commission shall verify the work of the 1882–4 Brazilian commission from Mt. Cupí to that point of the Roraima range where Brazil, British Guiana and Venezuela meet. It shall give preference to watersheds and

*November, 1907.*

conform to paragraphs 2 and 3 of article 2 of the treaty signed at Caracas, May 5, 1859 (*State Papers,* 50:1164) *Mensagem.... pelo presidente,* Rio de Janeiro, 1908; *Mem dipl.,* May 31, 1908.

*December, 1907.*

14 GERMANY—NETHERLANDS. Proclamation by Netherlands of treaty signed at Berlin August 27, 1907, respecting accident insurance. Approved by Netherlands November 29, 1907; ratifications exchanged at Berlin November 30, 1907. *Staatsb.,* 1907, Nos. 310, 332; *Reichs-G.,* 1907, No. 50.

18 CHILE—PERU. Convention signed at Lima. Liberal professions. *B. del ministerio de rel. ext.* (Lima), 6:77.

18 MEXICO—NETHERLANDS. Treaty of extradition signed.

18 CHILE—PERU. Protocol signed at Lima declaring in force the consular convention signed at Lima February 21, 1870 (*Aranda: Tratados del Peru,* 5:95), and amending the same. *B. del ministerio de rel. ext.* (Lima), 6:75. Executive approval by Peru December 18, 1907.

24 CHILE—PERU. Convention signed at Lima. Exchange of publications. *B. del ministerio de rel. ext.* (Lima), 6:79. Approved by Peru January 2, 1908.

*January, 1908.*

1 BULGARIA—ROUMANIA. Treaty of commerce and navigation signed at Bucharest November 20, 1907, takes effect. Text, *Mém. dipl.,* March 22. Term, three years and until one year from denouncement. Contains most favored nation clause, which does not apply, however, to any customs union entered into by either state.

1 FRANCE. Decree of April 29, 1907, takes effect. Reorganization of the Department of Foreign Affairs. The main divisions of business are geographical instead of by subjects. For M. Pichon's report, see *R. dipl.,* March 1, 1908.

3 BELGIUM—SERVIA. Ratifications exchanged at Belgrade of treaty of commerce signed at Belgrade April 24, 1907. *B. Usuel,* January 3; *Monit.,* January 16. This treaty was put into force by Servia October 9, 1907. *Monit.,* October 10. *See April 24, 1907.*

6 BULGARIA—FRANCE. Ratifications exchanged at Sofia of convention signed at Sofia January 5, 1907, for reciprocal protection of

*January, 1908.*

trademarks. *J. O.,* January 23, 1908. *J. du dr. int. privé,* 35:626. French decree promulgating, January 21, 1908.

9 BRAZIL—COLOMBIA. Brazilian Decree No. 1866 sanctioning and promulgating modus vivendi respecting the Ica and Putumayo rivers signed at Bogotá April 24, 1907. Approved by Brazilian congress December 31, 1907. *Mensagem......presidente,* Rio de Janeiro, 1908. *See December 29, 1907.*

10 COSTA RICA—NICARAGUA. Agreement signed for improvement of the bay of San Juan del Norte. *Mensaje del presidente,* 1908, San José.

12 COLOMBIA—PERU. Conflict at Union. Arose from boundary dispute. *See July 6, 1906,* and *April 24, 1907.*

13 NETHERLANDS. Ratification of international convention signed at Rome June 7, 1905, for establishment of a permanent international institute of agriculture. *Staatsb.,* 1908, No. 12. *See August 16, 1906,* and *January 27, 1908.*

16 NETHERLANDS—PERU. Protocol signed at Lima respecting consular convention signed at Lima September 25, 1907. *B. del ministerio rel. ext.,* 6:246.

17 ARGENTINE REPUBLIC—BOLIVIA. Exchange of ratifications at Buenos Aires of the convention signed at Buenos Aires May 18, 1907, relative to extension of the Central Northern Railroad into Bolivian territory and construction of railroad between Potosi and Tupiza. *B. del ministerio de rel. ext.* (Buenos Aires), 18:24. *See May 18, 1907.* For account of work completed, see *B. A. R.,* March.

18 Death at Greifswald of Professor Dr. FELIX STOERK. He succeeded Jules Hopf, who died July 12, 1886, as continuator of the *Nouveau recueil général de traités.*

18 FRANCE—ITALY. Agreement signed delimiting zones in which fishing rights are reserved exclusively for subjects of each State between islands of Corsica and Sardinia. *Mém. dipl.,* February 2.

20 SPAIN. Royal decree promulgating accession to the declaration respecting maritime law signed at Paris April 16, 1856. *Ga. de Madrid,* January 22; *Treaty ser.,* 1908, No. 9; *J. O.,* March 15; *J. du dr. int. privé,* 35:630. French decree approving acceptance of accession, January 21, 1908. For the declaration of Paris, see *J. du dr. int. privé,* Tables générales, 2:72, and for report to

*January, 1908.*

Emperor Napoleon III, *id.*, p. 73. Japan acceded to the Declaration, October 30, 1886.

30 BOLIVIA—PERU. Convention signed at La Paz to regulate in accordance with the treaty of commerce and customs signed November 27, 1905, the free transit of merchandise imported or exported through Mollendo or any other port that Peru may designate for the commerce of Bolivia. *B. A. R.*, May. Approved by Peru February 8, 1908. *B. del ministerio de rel. ext.* (Lima), 6:22.

*February, 1908.*

5 CHINA—JAPAN. Seizure by China of Japanese steamer Tatsu Maru off Macao. *North China Herald*, February 28; *The Tatsu Maru case, id.*, March 13, pp. 602, 649; *Times*, March 6, 9, 14, 16; *The Japanese boycott, North China Herald*, 87:325.

8 GERMANY—GREAT BRITAIN. Postal money order agreement signed at Berlin; signed at London January 9, 1908. *Cd.*, 4008.

8 FIRST INTERNATIONAL CONGRESS OF SOUTH AMERICAN STUDENTS, at Buenos Aires. *B. del ministerio de rel. ext.*, 18:187.

10 UNITED STATES. Ratification by President of arrangement signed at Rome December 9, 1907, for the organization of an international office of public hygiene to have its headquarters at Paris. Ratification advised by the Senate February 10, 1908.

21 ARGENTINE REPUBLIC. Decree concerning diplomatic ceremonial. *Ceremonial diplomatico argentino*, Buenos Aires, 1908; *B. del ministerio de rel. ext.*, 18:351; *Revista dipl.*, 2:7. Abrogated decrees of December 31, 1904, and May 17, 1906.

22 DOMINICAN REPUBLIC. New constitution adopted by Constituent Assembly. Went into force April 1. *Ga. oficial*, March 21, 1908.

22 RUSSIA—SWITZERLAND. Declaration signed at Berne, extending the provisions of Articles 1 and 3 of the extradition treaty signed November 17, 1873, and the list of offenses enumerated in Article 3. *Emploi abusif* of explosives is an extraditable offense. *Recueil des lois fédérales*, March 4, 1908; *J. du dr. int. privé*, 35:634.

22 GREAT BRITAIN—MOZAMBIQUE. Agreement signed at London for the direct exchange of parcels between the United Kingdom and the Portuguese colony of Mozambique. Signed at Lourenço Marquez January 9, 1908. *Cd.*, 4013.

*February, 1908.*

25 Costa Rica. Ratification of the Central American general treaty of peace and friendship signed at Washington December 20, 1907. *La Gaceta,* February 29. The approval by the various legislative bodies of the Central American governments of the conventions signed at Washington December 20, 1907, has taken place. *B. A. R.,* March; *La Gaceta,* Nos. 49, 50, and 54; *Dr. d'auteur,* 21: 39 and 42 *Marvand: La paix dans le Centre-Amerique, Q. dipl.,* 25:691; *La Gaceta,* Teugcigalpa, April 6.

25 Germany—Italy. Ratifications exchanged at Rome of convention signed at Rome November 9, 1907. Literary and artistic property. In force March 25, 1908. *Reichs-G.,* 1908, No. 13; *Ga. ufficiale,* March 25; *B. del ministero degli aff. est.* March; *Dr. d'auteur,* 21:41, 57. *See November 9, 1907.* Supersedes treaty signed June 20, 1884, and is intended to complete the stipulations of the revised Berne convention. Contains most favored nation clause.

25 United States. Deposit at Rio de Janeiro of ratification of convention signed at Rio de Janeiro August 13, 1906, defining the status of naturalized citizens who again take up their residence in the country of their origin. The terms of this convention become effective three months after such deposit.

26 Germany—Netherlands. Ratifications exchanged at Berlin of treaty signed at Berlin February 11, 1907, respecting reciprocal recognition of joint stock companies and other commercial, industrial, and financial associations. *Reichs-G.,* 1908, No. 11. Ratified by Netherlands January 13, 1908. *Staatsb.,* 1908, No. 11. Proclaimed at Berlin March 1, 1908. Extends to protectorates, colonies, and consular courts.

26 Guatemala—Honduras. Decree of Guatemala extending until March 1, 1910, the boundary convention signed March 1, 1895. *Mem. ...... rel. ext.,* Guatemala, 1908. *See June 25, 1907.*

29 Switzerland—United States. Treaty of arbitration signed at Washington. Ratification advised by the Senate March 6, 1908; ratified by the President May 29.

29 Great Britain—Roumania. British order in council declaring deserters from Roumanian merchant ships liable to apprehension in certain British territory. *London Ga.,* March 3. *See November 2, 1907.* Issued under subsection 1 of section 238 of the Merchant Shipping Act 1894.

*March, 1908.*

2 AUSTRIA—ROUMANIA. Convention signed at Bucharest for protection of literary, artistic, and photographic property. *Dr. d'auteur,* 21:66.

5 KONGO. Royal decree. Suppression of the crown domain. *Mém. dipl.,* March 29. To take effect when Belgium takes over sovereignty of Kongo under treaty of November 28, 1907. *Sardou: L'annexion du Congo par la Belgique, La nouvelle R.,* 3:175; *de Witte: La question du 'Congo Belge,' R. des deux mondes,* 45:363; *R. dipl.,* April 19.

5 BELGIUM—KONGO. Act signed at Brussels additional to the treaty of cession signed at Brussels November 28, 1907. *Mém. dipl.,* March 8, March 29; *Times,* March 12. Stipulates that Article I of the treaty of cession does not apply to the Fondation de la Couronne, the property of which, in the event of annexation, is handed over to the State which is to assume certain obligations. *Times,* March 6; *Payen: L'annexion de l'Etat du Congo à la Belgique, Q. dipl.,* 25:409; *Cd.,* 4079. *See February 4, 1908.*

7 PRUSSIA—SWEDEN. Promulgation at Berlin of treaty signed at Berlin November 16, 1907, for railway ferry between Sassnitz and Trelleborg. *Reichs-G.,* 1908, No. 21; *Preussische gesetzsammlung,* 1908, No. 17.

9 PERU—UNITED STATES. Ratification by United States of treaty signed at Lima October 15, 1907. Ratification advised by the Senate, February 19, 1908. Naturalization.

9 SECOND INTERNATIONAL CONFERENCE ON SLEEPING SICKNESS met at London. Represented: Germany, Spain, Kongo, France, Great Britain, Italy, Portugal. *Times,* March 10, 13, 14, April 9. Great Britain has decided to take independent action by establishing a National Sleeping Sickness Bureau at London. *See June 17, 1907. Cd.,* 3854.

10 GERMANY—GREAT BRITAIN. Supplementary agreement respecting commercial travelers' samples signed at Berlin. *Treaty ser.,* 1908, No. 8; *Reichs-G.,* 1908, No. 23. In amplification of the declaration concerning "patterns and samples imported by commercial travelers" signed at Berlin April 1, 1869.

10 UNITED STATES. The Senate advises and consents to ratification of six conventions signed at The Hague, October 18, 1907, viz.: (1) opening of hostilities, (2) laws and customs of land warfare, (3) rights and duties of neutral powers and persons in case of

war on land, (4) laying of submarine mines, (5) bombardment by naval forces in time of war, and (6) adaptation of the principles of the Geneva convention to maritime warfare. On March 12 the Senate approved the convention relative to certain restrictions on the exercise of the right of capture in maritime war and the declaration prohibiting discharge of projectiles and explosives from balloons; April 2, the convention for pacific settlement of international disputes; and April 17 the conventions respecting employment of force for recovery of contract debts, and rights and duties of neutral powers in naval war. *See October 18, 1907.* Additional references: *B. mensuel de la société de lég. comparée,* 39:148; *Holland: The Hague conference of 1907, Law quarterly and R.,* 24:76; *de Lapradelle and Stowell: Latin America at the Hague conference, Yale Law J.,* 17: No. 4; *Dokumente der zweiten Friedenskonferenz, Zeitschrift für int. Privat- und Öffentliches Recht,* 17:389; *Nippold: Die zweite Haager Friedenskonferenz, id.,* 17:504; *Wilcox: The Hague conference from a woman's point of view, Independent,* 64:566; *Lémonon: La seconde conférence de la paix et ses results juridiques, J. du dr. int. privé,* 35:31; *R. gén. de dr. int. public,* 14, documents 29; *Renault: Les deux conférences de la paix,* Paris, 1908; *Pédoya: Les conférences de la Haye,* Paris, 1907; *Arch. dipl.,* 105:21; *Ernst: L'œuvre de la deuxième conférence de la paix,* Brussels and Paris, 1908; *Saint-Maurice: La deuxième conférence de la paix,* Paris, 1908.

12 FRANCE—UNITED STATES. Ratifications exchanged at Washington of general arbitration treaty signed at Washington February 10, 1908, *q. v.* French decree promulgating, March 14. *J. O.,* March 15; *J. du dr. int. privé,* 35:631.

13 TURKEY. Note addressed to the six ambassadors informing them of the renewal of the mandates of the foreign agents of reform in Macedonia until July 12, 1914. *Cd.,* 4076. Turkey had proposed to take the foreign agents and the members of the financial commission into Turkish service with their present duties in a note verbale dated December 15, 1907, but the powers declined. For current bibliography, see *February 5, 1908.* *Sloane: Turkey in Europe, Political science quarterly,* 23:297; *Times,* May 1.

14 SALVADOR—UNITED STATES. Citizenship convention signed at San *oficial,* March 17. Ratification advised by United States Senate April 13; ratified by the President May 26, 1908.

*March, 1908.*

14 AUSTRIA-HUNGARY—SERVIA. Treaty of commerce signed at Vienna. *Mém. dipl.*, March 22.

14 AUSTRIA-HUNGARY. Royal rescript adjourns diet of Croatia to a date undetermined. *Mém. dipl.*, March 22; *Times*, March 16.

14 GREAT BRITAIN—PARAGUAY. Declaration signed at Asuncion amending treaty of commerce signed at Asuncion October 16, 1884. *Treaty ser.*, 1908, No. 14; *State Papers*, 75:929.

> * * * agree that any of His Majesty's Colonies, Possessions or Protectorates may withdraw from the Treaty separately at any time on giving twelve months' notice to that effect, but that nevertheless the goods produced or manufactured in any of His Britannic Majesty's Colonies, Possessions and Protectorates shall enjoy in Paraguay complete and unconditional most-favoured-nation treatment, so long as such Colony, Possession or Protectorate shall accord to goods the produce or manufacture of Paraguay treatment as favourable as it gives to the produce or manufacture of any other Country.

16 FRANCE—SWITZERLAND. Conference relative to approaches to the Simplon opened at Berne. *Mém. dipl.*, March 22.

17 CUBA. Decree ratifying the convention signed at Rio de Janeiro August 13, 1906, relating to pecuniary claims. *Ga. oficial*, March 18.

17 CUBA. Decree adhering to the convention signed at Geneva July 6, 1906, for the amelioration of the condition of soldiers wounded in the field of battle. *Ga. oficial*, March 18.

18 FRANCE—GREAT BRITAIN. Ratifications exchanged at London of convention signed at London January 9, 1907, respecting commercial relations between France and Barbados. *Treaty ser.*, 1908, No. 7; *J. O.*, April 2, 1908. French decree promulgating, April 1, 1908.

19 NICARAGUA—SPAIN. Ratifications exchanged at Paris of treaty of obligatory arbitration signed at Guatemala October 4, 1904. *Ga. de Madrid*, April 17, 1908.

19 NICARAGUA—SPAIN. Ratifications exchanged at Paris of convention signed at Guatemala October 4, 1904. Mutual recognition of validity of academic degrees. *Ga. de Madrid*, April 14.

20 ARGENTINE REPUBLIC. Decree constituting committee charged with preliminary work of the Fourth International American Conference, to be inaugurated at Buenos Aires May 25, 1910. *Revista dipl.* (Buenos Aires), 2:3; *B. A. R.*, June.

20 CRETE. The High Commissioner notified the four protecting

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powers that the conditions laid down as preliminary to withdrawal of their troops, had been realized, to wit: (1) organization of a native *gendarmerie,* (2) maintenance of tranquillity, and (3) security of the Musulman population. France, Great Britain, Italy and Russia, have announced their decision to withdraw their forces gradually in the course of a year. They had in 1898 constituted the island an autonomous State under a High Commissioner of the Powers, subject to the suzerainty of the Porte. Since August 14, 1906, the right of the King of Greece to propose the High Commissioner has been recognized by the protecting powers, under whose sanction Greek officers have taken over the direction of the gendarmerie and militia.

21 INTERNATIONAL MEDICAL ASSOCIATION to aid in suppression of war in general annual reunion at Paris. Proceedings in *Mém. dipl.,* March 29.

21 FRANCE. Law authorizing ratification of convention signed at Rome December 9, 1907, for the creation at Paris of an international office of public hygiene. *J. O.,* March 24. *See February 10, 1908.*

22 CHINA. Imperial decree concerning consumption of opium. *The latest opium decree, North China Herald,* March 27, 1908; *Times,* April 17. *See January 27, 1908.*

23 COLOMBIA. Decree providing for reorganization of the diplomatic and consular service. *B. A. R.,* May.

23 SWEDEN. Ratification deposited at Brussels of the Additional Act signed at Brussels August 28, 1907, to the international sugar convention signed March 5, 1902, relative to the accession of Russia to the Sugar Union. Ratification deposited by Peru, January 11, 1908; Switzerland, January 24, 1908; Belgium, France, and Netherlands, January 31; Austria and Hungary, February 13; Germany, Luxemburg, and Great Britain, February 14; Sweden, March 23. All the signatory powers have deposited ratifications except Italy, which preserves the faculty of carrying out this formality until July 1, 1908. *See March 31, 1908,* and *August 28, 1907. Treaty ser.,* 1908, No. 12; *Reichs-G.,* 1908, No. 16; *Staatsb.,* 1908, No. 46.

24 MEXICO—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate April 2; ratified by the President May 29, 1908.

27 AUSTRIA-HUNGARY. Deposit at Berne of ratification of the inter-

*March, 1908.*

national convention signed at Geneva July 6, 1906, for the improvement of the condition of wounded in armies in the field.

27 JAPAN. Ratification of radiotelegraphic convention signed at Berlin November 3, 1906.

28 GREAT BRITAIN. Terms of settlement arranged with friendly Afridi clans in Walai. Each of the Afridi clans goes security for the future good behavior of a named subsection of the Zakka Khel. As a pledge of good faith in guaranteeing punishment of the offending Zakkas, rifles to value of 20,000 rupees are deposited with the British government. *Times,* April 9; *Q. dipl.,* 25:749.

28 ITALY—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by Senate April 2, 1908.

28 GREECE—MONTENEGRO. Treaty of commerce signed at Cettigne. *R. dipl.,* April 5. On basis of most favored nation principle.

31 GREAT BRITAIN—SERVIA. Ratifications exchanged at Belgrade of treaty of commerce signed at Belgrade February 17, 1907. *Treaty ser.,* 1908, No. 13. Supersedes treaty signed July 10, 1893, and is binding until December 31, 1917, and until one year after denouncement. Contains most favored nation clause, with Customs Union exception. The duties under this treaty went into effect in Servia March 15, 1907. For details of the modifications introduced into the Servian general tariff, see *Board of Trade J.,* London, March 7 and 14, 1907; *Cd.,* 3749.

31 NETHERLANDS. Ratification deposited at Brussels of the protocol signed at Brussels December 19, 1907, relative to the accession of Russia to the Sugar Convention. Ratification deposited by Switzerland, January 24; Belgium and France, January 31; Austria and Hungary, February 13; Germany, Great Britain, Luxemburg, and Russia, February 14; Sweden, March 23; Peru, March 26; Netherlands, March 31. All signatory powers have deposited ratifications except Italy, which preserves the faculty of carrying out this formality until July 1, 1908. *See December 19, 1907,* and *March 23, 1908. Treaty ser.,* 1908, No. 12; *B. Usuel,* April 1, 1908; *Monit.,* April 19; *Reichs-G.,* 1908, No. 16; *J. O.,* May 10.

31 UNITED STATES. Ratification deposited with the government of Mexico of the convention signed at Mexico January 27, 1902, on literary and artistic copyrights. *U. S. Treaty series,* No. 497. Ratification advised by the Senate January 31, 1908; ratified by

*March, 1908.*

the President March 16, 1908; proclaimed April 9, 1908. This convention has been ratified by Guatemala, Salvador, Costa Rica, Honduras, and Nicaragua, and their ratifications were deposited with the Government of Mexico respectively as follows: April 25, 1902; May 19, 1902; June 28, 1903; July 4, 1904, and August 13, 1904. It is provided by its Article XV that the convention "shall take effect between the signatory States that ratify it, three months from the day they communicate their ratifications to the Mexican Government."

*April, 1908.*

1 BELGIUM—JAPAN. Telegraphic money order exchange established. *L'union postale,* 33:80.

2 FRANCE—MEXICO. French decree promulgating arrangement signed at Mexico May 28, 1907, modifying article 3 and the first paragraph of article 5 of the convention signed at Mexico December 10, 1891, (*De Clercq,* 19:288). Ratifications exchanged at Mexico December 28, 1907. Parcels post. *J. O.,* April 4, 1908.

3 CHILE—COLOMBIA. Convention signed at Bogotá. Exchange of publications. *B. del ministerio de rel. ext.* (Bogotá), 1:353.

4 GREAT BRITAIN—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate April 22, 1908; ratified by the President May 11, 1908; ratified by Great Britain May 4, 1908; ratifications exchanged at Washington June 4, 1908; proclaimed June 5, 1908. *U. S. Treaty ser.,* No. 494. Article I identical with Article I of the arbitration treaty between France and United States signed at Washington February 10, 1908, *q. v.*

> Article 2. In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof; His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.
>
> Such Agreements shall be binding only when confirmed by the two Governments by an Exchange of Notes.

*April, 1908.*

4 NORWAY—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate April 17, 1908.

6 FOURTH INTERNATIONAL CONGRESS OF MATHEMATICIANS opened at Rome. *Nation,* May 14. Next congress in 1912 at Cambridge, England, will be a joint congress on mathématics and physics.

6 PORTUGAL—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate April 17, 1908.

6 FRANCE—SPAIN. Ratifications exchanged at Bayonne of declaration signed at Bayonne June 9, 1906, relative to oyster fishing in the Bidassoa. French decree promulgating, April 18, 1908. *J. O.,* April 19. This declaration modifies the declaration signed at Bayonne October 4, 1894 (*DeClercq,* 20:173), with which it is to be considered an integral part of the convention signed at Bayonne February 18, 1886 (*DeClercq,* 17:77); *Lopez y Medina: Tratados de pesca* (Madrid, 1906) p. 37; *Ga. de Madrid,* April 21, 1908.

6 SPAIN—UNITED STATES. Ratifications exchanged at Madrid of treaty of extradition and protocol amending articles 3 and 4 thereof. Treaty signed at Madrid June 15, 1904; protocol signed at San Sebastian August 13, 1907; ratification advised by the Senate January 16, 1908; ratified by the President February 5, 1908; ratified by Spain March 30, 1908; proclaimed by the President May 21, 1908. *U. S. Treaty ser.,* No. 492; *Ga. de Madrid,* April 12.

7 CHINA. Decree respecting opium. Appoints special imperial commissioners of opium prohibition, who are to establish hospitals where those addicted to opium consumption may have special attention. *North China Herald,* 87:89.

9 FRANCE. Decree placing Mayotte and Dependencies (Comoro group) under supreme authority of the Governor-General of Madagascar. Administrative and financial autonomy is retained under a functionary appointed from the general colonial service. *Geographical J.,* 31:677.

10 JAPAN—RUSSIA Signature and exchange at Vladivostock of the documents relating to the delimitation of the boundaries of the Island of Sakhalin by the chiefs of the Russian and Japanese Boundary Commissioners. *Times,* April 23.

11 GREAT BRITAIN—UNITED STATES. Convention signed at Washington concerning the inland fisheries in waters contiguous to the

*April, 1908.*

United States and Canada. Ratification advised by the Senate April 17; ratified by the President May 11; ratified by Great Britain May 12; ratifications exchanged at Washington June 4; proclaimed by President July 1.

11 GREAT BRITAIN—UNITED STATES. Treaty signed at Washington. To settle all difficulties connected with the international boundary line, such as its redelimitation and the prevention of smuggling. Where the boundary runs on land, the matter is to be referred to a joint commission similar to the one which is to deal with the fisheries question; where the line passes over water, dispute concerning it will be referred to a waterways commission. Ratification advised by the Senate May 4; ratified by Great Britain May 16; ratified by the President May 11; ratifications exchanged at Washington June 4, 1908; proclaimed by President July 1.

12 PERSIA—RUSSIA. Kurds attack frontier guards near Russian Belesuvar. Later Russian troops crossed the Persian frontier and defeated the Kurds in the mountains of Kara Dagh. *Times,* April 18.

13 SALVADOR. Decree respecting the national sovereignty and treaties and conventions.

14 GERMANY—SALVADOR. Treaty signed at San Salvador. Most favored nation treatment in commerce, navigation, and consular privileges. *Diario oficial,* April 20. Ratified by Salvador May 4, 1908.

15 GREAT BRITAIN—PANAMA. Agreement signed at Panama for direct exchange of parcels by parcels post.

16 BRAZIL—PERU. Convention signed at Lima for free navigation of the Japurá by Brazilian and Peruvian vessels, merchant or war. A similar agreement was signed at Lima, September 29, 1876, respecting the Putumayo. *Aranda: Tratados del Peru,* 2:619.

16 FRANCE—SPAIN. Protocol signed modifying convention respecting transpyrenean railroads. *Mém. dipl.,* April 19.

18 FRANCE—GERMANY. Convention signed at Berlin. Delimitation of frontier between French Kongo and Kamerun. *Mém dipl.,* April 26. Substitutes a more natural frontier for the artificial line tentatively fixed by the convention signed at Berlin, March 15, 1894.

20 BRAZIL—COLOMBIA. Ratifications exchanged at Rio de Janeiro of treaty signed at Bogotá April 24, 1907, respecting free navigation

*April, 1908.*

of the Japurá. *See April 24, 1907.* Promulgated in Brazil April 23, 1908. *Mensagem......pelo presidente,* Rio de Janeiro, 1908.

20 ITALY—TURKEY. The Turkish ambassador at Rome hands the foreign office a note from the government of Turkey putting an end to the difference between the two countries. Italy may open post offices for Italians at Constantinople, Saloniki, Vallona, Smyrna, and Jerusalem. *L'incident italo-turc, Mém. dipl.,* April 26; *R. dipl.,* April 26; *Times,* April 20.

20 SPAIN—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate, April 22; ratified by the President May 28, 1908; ratified by Spain May 11, 1908; ratifications exchanged at Washington June 2, 1908; proclaimed June 3, 1908. *U. S. Treaty ser.,* No. 493. Similar to treaty with France signed February 10, 1908, *q. v.*

21 FIRST INTERNATIONAL LARYNGO-RHINOLOGY CONGRESS opened at Vienna. Adjourned April 25. *Times,* April 22.

23 DENMARK—GERMANY—RUSSIA—SWEDEN. Declaration signed at St. Petersburg relative to the Baltic. *Mém. dipl.,* April 26; *Q. dipl.,* 25:738.

23 DENMARK—FRANCE—GERMANY—GREAT BRITAIN—NETHERLANDS—SWEDEN. Declaration and memorandum signed at Berlin on the subject of the *status quo* in the territories bordering on the North Sea. *Cd.,* 3964; *Mém. dipl.,* April 26; *Q. dipl.,* 25:738; *Doc. dipl., Accords relatifs à la mer du nord,* 1908; *Fortnightly R.,* 83:932.

23 FRANCE—GREAT BRITAIN—SWEDEN. Act signed at Stockholm denouncing the treaty signed at Stockholm, 1855.

23 JAPAN. Ratification deposited at Berne of the Geneva Red Cross convention signed July 6, 1906. The reservation made by the Japanese delegate on the subject of article 28 is withdrawn.

24 SECOND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW at Washington. Adjourned April 25.

27 JAPAN—NETHERLANDS. Consular convention signed at The Hague with regard to the Dutch colonies in the East Indies. *See September 25, 1907.*

28 INTERNATIONAL CONFERENCE OF DIPLOMATIC REPRESENTATIVES at Brussels. To consider a revision of the regulations dealing with traffic in arms and ammunition in Africa. Fourteen states represented: Belgium, Kongo, France, Germany, Great Britain,

*April, 1908.*

Netherlands, Italy, Liberia, Portugal, Russia, Spain, Sweden, Turkey, and United States. Presided over by M. L. Capelle, Director-General of Commerce and Consulates in the Belgian Foreign Office. *Times,* April 30.

29 FRANCE. Law relative to the conditions of application of article 5 of the treaty with Siam signed at Bangkok March 23, 1907. *J. O.,* May 1; *Dauge: Condition juridique des étrangers au Siam et organisation judiciaire, Clunet,* 27:461; *id.,* 34:1244.

*May, 1908.*

1 RUSSIA—SERVIA. Ordinary money order exchange established on basis of a private agreement. *L'union postale,* 33:80.

2 NETHERLANDS—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate May 6, 1908.

2 SWEDEN—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate May 6, 1908.

3 MOROCCO. The troops of Abdel Aziz occupied Safi without resistance. *Q. dipl.,* 24:724; *J. du débats,* May 15; *Aktenstücke über Marokko,* 208 pp.; *Maxey: Morocco moriturus, Forum,* 39:568; *Moore: The passing of Morocco,* London.

4 INTERNATIONAL CONFERENCE ON ELECTRICAL TELEGRAPHY, at Lisbon. *R. dipl.,* February 23.

5 FRANCE. Order of the minister for foreign affairs instituting a commission for the purpose of studying ways and means of regulating conflicts in the matter of nationality between French and foreign laws. *J. O.,* May 7.

5 JAPAN—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate May 13, 1908.

7 PORTUGAL—UNITED STATES. Naturalization treaty signed at Washington. Ratification advised by the Senate May 14, 1908.

7 PORTUGAL—UNITED STATES. Extradition treaty signed at Washington. Ratification advised by the Senate May 22, 1908.

11 LAYING OF CORNERSTONE OF THE INTERNATIONAL BUREAU OF AMERICAN REPUBLICS at Washington. *B. A. R.,* May and June, 1908; *Times,* May 12.

11 UNITED STATES. An Act to amend an Act entitled "An Act to provide for the reorganization of the consular service of the United States," approved April 5, 1906. Takes effect July 1, 1908. *Stat. at L.,* vol. 35.

*May, 1908.*

12 EIGHTEENTH ANNIVERSARY OF THE AMERICAN PEACE SOCIETY took place at Boston. Proceedings in *Advocate of Peace,* June, 1908.

14 FRANCO-BRITISH EXHIBITION opened by Prince and Princess of Wales. *L'exposition franco-britannique, R. dipl.,* May 17; *Some neglected aspects of the entente cordiale, National R.,* 51:539; *Times,* April 2, 20, May 8.

14 TRINIDAD and TOBAGO. Accession in force to the industrial property convention signed at Paris March 20, 1883, as modified by the additional act signed at Brussels December 14, 1900. *Treaty ser.,* 1908, No. 11. The Swiss government received notice of the accession April 6, and notified the states interested April 14, 1908. By the stipulations of Article 16 of the revised convention the accession takes effect one month after the latter date. *J. O.,* May 1.

15 SALVADOR. Ratification in all its parts of the principal convention of the Universal Postal Union signed at Rome May 26, 1906, as well as the final protocol and further convention concerning exchange of postal parcels and international money orders. *Diario oficial,* May 18.

16 ABYSSINIA—ITALY. Frontier convention signed at Adis Ababa. Fixes starting point on the Juba River at Dolo, above Lugh; thence it is carried to the Webi Shebeli, where it joins, and follows to the frontier of British Somaliland, the line laid down in the arrangement signed September, 1897. Fixes the frontier of the Danakil country in Eritrea at a distance of 60 kilometers from the coast, and makes provision for payment by Italy to Abyssinia of indemnity of 3,000,000 lire. *Geographical J.,* 31:675.

18 DENMARK—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate May 20.

18 GREAT BRITAIN—UNITED STATES. Convention signed at Washington. Ratification advised by the Senate May 20. Wreckage and salvage.

18 EIGHTH INTERNATIONAL CONGRESS ON ARCHITECTURE at Vienna. *Mém. dipl.,* May 24.

19 JAPAN—UNITED STATES. Treaty signed at Washington for the protection in China of inventions, designs, trademarks, and copyrights of American citizens and Japanese subjects. *J. of the American Asiatic Assn.,* 7:280, 300; 8:140. Ratification advised

*May, 1908.*

by the Senate May 20; ratified by the President June 2. *La protection des marques étrangères en Chine, R. de dr. int. privé et de dr. pénal int.,* 4:504; *North China Herald,* 84:117 and 85:629.

19 JAPAN—UNITED STATES. Treaty signed at Washington for protection in Korea of inventions, designs, trademarks, and copyrights of American citizens and Japanese subjects. *J. of the American Asiatic Assn.,* 8:140.

20 LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION. Fourteenth annual meeting at Mohonk Lake, New York. Adjourned May 22. *B. A. R.,* June.

23 INTERNATIONAL INSTITUTE OF AGRICULTURE inaugurated at Rome by King of Italy. *Mém. dipl.,* May 31. On the 25th the permanent committee held its first meeting and adopted French as the official language of the Institute. *See January 29, 1908.*

24 TURKEY. Iradé authorizing construction of four new sections of the Bagdad Railway. *Mém. dipl.,* May 31.

24 FRANCE. Decree establishing competitive examinations for posts of student vice-consuls. *J. O.,* May 26.

25 UNITED STATES. Joint resolution to provide for the remission of a portion of the Chinese indemnity. *Stat. at L.,* vol. 35. The President is authorized to consent to a modification of the bond for $24,440,778.81, dated December 15, 1906, received from China pursuant to the protocol signed at Peking September 7, 1901 (*For rel.,* 1901, appendix), so that the total payment to be made by China under the said bond shall be limited to $13,655,492.69 and interest at the stipulated rate of four per cent. *H. report* 1107, 60 Cong. 1 sess; *J. of the American Asiatic Assn.,* 8:19, 135.

25 Inauguration of the CENTRAL AMERICAN COURT OF JUSTICE at Cartago, Costa Rica. *B. A. R.,* June. Andrew Carnegie has offered $100,000 for the purpose of erecting at Cartago a temple of peace for the exclusive use of the Central American Court of Justice. *See February 5, 1908.*

HENRY G. CROCKER.

# PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

## UNITED STATES [1]

Anarchists and aliens of criminal classes, Deportation of, under immigration act of Feb. 20, 1907. March 3, 1908. 1 p. *Bureau of immigration and naturalization.* (Dept. circular 163.)

Arbitration convention between the United States and France. Signed at Washington Feb. 10, 1908; proclaimed March 14, 1908. 5 p. *Dept. of state.*

Copyrights, Convention between the United States and other powers on literary and artistic. Signed at the City of Mexico Jan. 27, 1902; proclaimed April 9, 1908. 16 p. *Dept. of state.*

Immigration laws and regulations of July 1, 1907. 4th ed. Feb. 15, 1908. 83 p. *Bureau of immigration and naturalization.* Paper, 10c.

Military laws of the United States, 4th edition, by George B. Davis. 1908. 1361 p. *War dept.* Half sheep, $1.50.

## GREAT BRITAIN [2]

Asiatics in the Transvaal, Further correspondence relating to legislation affecting. *Foreign office.* (cd. 3892.) 1d.

Bulgaria, Commercial convention, protocol, and declaration between the United Kingdom and. Signed at Sofia Dec. 9, 1905. *Foreign office.* (cd. 3858.) 3d.

Commercial travellers' samples, Supplementary agreement between the United Kingdom and Germany respecting. Signed at Berlin March 10, 1908. *Foreign office.* (cd. 3961.) ½d.

Congo, Further correspondence respecting the Independent State of the. [April to Dec., 1907.] *Foreign office.* (cd. 3880.) 6½d.

Curaçoa, Agreement between the post-office of the United Kingdom and the post-office of, for the exchange of money orders. *Post-office.* (cd. 3904.) 2½d.

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[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

[2] Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, Eng.

Egypt, Agreement additional to the commercial convention between the United Kingdom and, of Oct. 29, 1889. Signed at Cairo Dec. 16, 1907. *Foreign office.* (cd. 3874.) ½d.

France, Convention between the United Kingdom and, respecting commercial relations between France and Barbados. Signed at London Jan. 9, 1907. *Foreign office.* (cd. 3959.) ½d.

France, Exchange of notes between the United Kingdom and. Arrangements under article X, § 4, of the convention of Oct. 20, 1906, respecting the New Hebrides. August 29, 1907. *Foreign office.* (cd 3876.) 2½d.

German Empire, Agreement between the post-office of the United Kingdom and the post-office of the. 1908. *Post-office.* (cd. 4008.) 2½d.

House of lords manuscripts. New series, vol. 4. 1699–1702. (H. of L. papers, 1908, no. 7.) 2s. 9d.

Japan, Agreement concerning the exchange of postal parcels between the post-office of the United Kingdom and the department of communications of the Empire of. 1908. *Post-office.* (cd. 3902.) 2½d.

Macedonia, Further correspondence respecting proposals by H. M. government for reforms in. *Foreign office.* (cd. 3958.) 1½d.; (cd. 3963.) 1½d.

Maritime law, Accession of Spain to the declaration respecting, signed at Paris April 16, 1856. Jan. 18, 1908. *Foreign office.* (cd. 3962.) ½d.

Moçambique, Agreement for the direct exchange of parcels between the United Kingdom and the Portuguese colony of. *Post-office.* (cd. 4013.) ½d.

North Sea, Correspondence with H. M. ambassador at Berlin respecting a declaration by the governments of Great Britain, Denmark, France, Germany, the Netherlands, and Sweden, on the subject of the maintenance of the "*status quo*" in the territories bordering upon the. 1908. *Foreign office.* (cd. 3964.) ½d.

Norway, Treaty between the United Kingdom, France, Germany, Norway, and Russia respecting the independence and territorial integrity of. Signed at Christiania Nov. 2, 1907. *Foreign office.* (cd. 3878.) ½d.

Opium question in China, Correspondence respecting the. [Sept. 1906 to Feb. 1908.] *Foreign office.* (cd. 3881.) 7d.

Panama, Despatches from H. M. minister at, respecting the employment of British West Indian labour in the Panama Canal Zone. *Foreign office.* (cd. 3960.) 1½d.

Persia, Extract from despatch from the government of India to the secretary of state for India in council, dated Sept. 21, 1899, relating to British policy in. *Foreign office.* (cd. 3882.) 1½d.

Russia, Correspondence respecting the adhesion of, to the Brussels sugar convention of March 5, 1902. *Foreign office.* (cd. 3877.) 2½d.

Salvador, Agreement between the post-office of the United Kingdom and the post-office of the Republic of, for the exchange of money orders. *Post-office.* (cd. 3903.) 2½d.

Surinam, Additional articles to the money order agreement between the post-offices of the United Kingdom and, of 29 April, 1906. *Post-office.* (cd. 3905.) ½d.; (cd. 3980.) ½d.

Sweden, Accession of, to the international sanitary convention signed at Paris Dec. 3, 1903. Dec. 20, 1907. *Foreign office.* (cd. 3957.) ½d.

Treaties, etc., relating to commerce and navigation between Great Britain and foreign powers, wholly or partially in force on July 1, 1907, Handbook of. 1908. xii, 1192 p. *Foreign office.* 10s.

Treaties and conventions, A complete collection of the, and reciprocal regulations at present subsisting between Great Britain and foreign powers, so far as they relate to commerce and navigation, the slave trade, post-office communications, copyright, etc. v, 24. 1907. *Foreign office.* 15s.

Wounded and sick in armies in the field, Accession of Colombia to convention signed at Geneva July 6, 1906, for the amelioration of the condition of the. Oct. 28, 1907. *Foreign office.* (cd. 3879.) ½d.

### BOLIVIA

Programa de gobierno formulado por Fernando E. Guachalla jefe del partido liberal y candidato á la Presidencia de Bolivia. La Paz, 1908. 41, xxiv p.

### CUBA

Informe de la administracion provisional, desde 13 de Octubre de 1906 hasta el 1°. de Diciembre de 1907 por Charles E. Magoon, gobernador provisional. Habana, 1908. iv, 571 p., illus.

Report of provisional administration from October 13th, 1906, to December 1st, 1907. By Charles E. Magoon, provisional governor. Havana. 557 p., illus.

### COUR PERMANENTE D'ARBITRAGE

Relevé général de clauses d'arbitrage communiquées au Bureau international. 1907. 12 p. *Bureau international de la Cour permanente d'arbitage.*

Traités généraux d'arbitrage, communiqués au Bureau international de la Cour permanente d'arbitrage. [1907.] 3 p. *Bureau international de la Cour permanente d'arbitrage.*

### UNION INTERNATIONALE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES

Conférence de Berlin. Documents préliminaires. 1–3. Berne, 1907. 44 p.; documents preliminaires. 4. 1908. 52 p.

PHILIP DE WITT PHAIR.

# JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

## THE SCHOONER TWO COUSINS

(Decided May 13, 1907.)

*42 United States Court of Claims, 436*

I. The schooner *Two Cousins,* Elijah Devall, master, sailed on a commercial voyage on or about February 11, 1797, from Jeremie, bound for Philadelphia. It appears, from the master's protest, that a few days thereafter, while peacefully pursuing said voyage, she was captured on the high seas by the French privateer *La Magdelaine* and manned with a prize crew; that on the 27th of February, near the island of Cuba, said schooner met with a Spanish war vessel, *The Gloria,* which fired several cannon shots at her; that the prize crew ran the *Two Cousins* aground and ordered the American seamen to go in the boat with them; the master refused to consent thereto; that the prize crew cut away the fasts of the boat on deck, the standing and running rigging, sunk the anchors, and abandoned the schooner with her American flag flying as aforesaid; that the master resumed command of the schooner after such abandonment, put the main topsail back, put the vessel about to leeward, and in a short time got her off from being aground. Shortly thereafter the boat of the Spanish war vessel reached the schooner and, taking her in tow, carried her alongside of said war vessel, where the master was examined; that after the Spanish officers had left the schooner the master called his crew, who had been forced to go on shore by the Frenchmen, to come on board, with which command they refused to comply. Thereupon the schooner was taken to Habana. The French privateer proceeded to Cape Francois and obtained a condemnation of the vessel and cargo upon the ground that she had come from Jeremie in violation of the decree of the commission of the executive directory declaring Jeremie to be in a state of siege. He appeared at Habana and claimed the schooner as his prize. Upon trial by the Spanish authorities and the production of said French decree of condemnation said schooner and cargo were delivered to the French privateer (each party being required to pay his own costs and to share equally the costs made in common). By virtue of the condemnation by France the vessel and cargo became a total loss to the owner thereof.

PEELLE, Ch. J., delivered the opinion of the court:

The facts upon which the decision in this case is founded are set forth in finding I, the material substance of which is that after the *Two Cousins* had been captured by a French privateer the privateer was fired upon by a Spanish vessel of war, whereupon the prize crew ran the captured vessel aground and compelled her seamen to go on the boat with them, but the master refused and remained on the vessel. After the prize crew had cut away the fasts of the boat on deck, the standing and running rigging, and sunk the anchor, they abandoned the vessel, with the American flag flying. The master resumed command and soon got the vessel off from being aground, when the Spanish war vessel came alongside and took the vessel in tow. The master of the American vessel tried to get his crew to come on board, but they refused, and thereupon the Spanish vessel of war towed the *Two Cousins* to Habana. In the meantime, the privateer proceeded to Cape Francois and obtained a condemnation of the vessel. The captor appeared in Habana and claimed the vessel so captured, insisting that he had not abandoned the vessel or lost sight thereof, and produced the decree of condemnation, whereupon the question as to which was entitled to the possession of the vessel, the master or the captor, was submitted to a Spanish court, who decided in favor of the captor, and the vessel and cargo were delivered to him and were subsequently sold and became a total loss.

The single question is, Which of the two nations, France or Spain, is primarily liable? The capture and condemnation of the vessel and cargo by the French were both illegal independently of the absence of the master and the vessel from the jurisdiction of the prize court at the time of condemnation. The taking of the vessel into the port of Habana by the Spanish vessel of war was not an unfriendly act, especially as they had forced the French to abandon the vessel, and the master was unable to induce his crew to return. The controversy over the vessel in the Spanish port was not as to the title of the vessel, but as to the possession thereof, which was clearly within the jurisdiction of the Spanish court.

Respecting this question Mr. Justice Story, in the case of *The Tilton* (5 Mason, 455), said:

> Suits in admiralty, touching property in ships, are of two kinds — one called *petitory* suits, in which the mere title to the property is litigated and sought to

> be enforced independently of any possession which had previously accompanied or sanctioned that title; the other called *possessory* suits, which seek to restore to the owner the possession of which he had been unjustly deprived when that possession has followed a legal title, or, as it is sometimes phrased, when there has been a possession under a claim of title with a *constat* of property. Until a comparatively recent period the court of admiralty exercised undisturbed jurisdiction over both classes of cases, as upon principle it is still entitled to do. * * * No doubt exists that the admiralty possesses authority to decree restitution of ships wrongfully withheld from the owners. And if so, it ought to possess plenary jurisdiction over all the incidents.

That questions of prize in general belong to the capturing power there can be no question, and this was the view of the court in the case of *The L'Invincible* (1 Wheat., 238).

In the case of the brig *Alerta* (9 Cranch, 359) a libel was filed in the district court at New Orleans by a Spanish subject, setting forth that he was the owner of the brig *Alerta* and cargo, and that while on a voyage from Africa to Habana in 1810 he was captured by a French vessel and taken into the port of New Orleans. The libelant alleged that the French vessel was not commissioned to capture the property of Spanish subjects and that she was armed and equipped in the port of New Orleans by American citizens contrary to the law of nations. The prayer was for the restitution of the vessel, with damages. The prize master admitted the capture of the *Alerta* as lawful prize of war and asserted that the French vessel at the time of the capture was legally authorized to capture all vessels and their cargoes belonging to the subjects of Spain as enemies of France; that after the capture he was compelled to enter the port of New Orleans by stress of weather, owing to the inability of the *Alerta* to keep the sea. The court below decreed restitution to the libelant of the ship and cargo, and that decree was affirmed by the Supreme Court.

And so in the case of the *Amy Warwick* (2 Sprague, 150), the court in substance held that a prize court could look beyond the legal title and deal with the beneficial interests.

In the case of the schooner *Mary*, Thomas, master (2 Wheat., 122, 129), the vessel, commanded by British subjects, was captured by the private armed schooner *Cadet*, an American vessel. The convoy under which the *Mary* sailed was in sight of her at the time of her capture. The *Cadet*, however, came up to the *Mary* so suddenly that she had no opportunity to make resistance or give notice to the convoy of her danger. On the next day the *Cadet* and *Mary* being in company, the *Paul Jones*, an armed brig bearing sails of English canvas, pursued the *Mary*, firing at her. The prize master, being convinced that it was an English cruiser, left the *Mary* for the shore, after throwing over her anchor. Within ten minutes after the prize crew had left the *Mary* the British master hoisted the English colors and steered the schooner toward the *Paul Jones*, and she was boarded by a boat from the *Paul Jones;* and being informed that the *Mary* was an English vessel the *Paul Jones* immediately stood off from the land, with the *Mary* in company, with English colors flying.

Libels were filed against the *Mary* and her cargo in the district court for the district of Maine by the master in behalf of himself, the owners and crew of the *Cadet*, the captor, and the *Mary* was condemned; but on appeal the decree was reversed, the court saying:

> We are of opinion that the facts stated in this appeal made a clear case of tortious dispossession on the part of the *Paul Jones.* The privateer *Cadet* had, with great gallantry, captured the *Mary* and been in possession of her half of a night and day. The prize was close in upon the American coast and making for a port which was open before her. It was not until the superior sailing of the *Paul Jones* made it manifest that the prize must be cut off from this port, and until she had been repeatedly fired upon, that the prize crew abandoned her. There exists not a pretext in the case that this abandonment was voluntary, or would have taken place but for the hostile approach of the *Paul Jones.* Whether the *vis major* acted upon the force or the fears of the prize crew is immaterial, since actual dispossession ensued. * * *
>
> We are of the opinion that the decisions of the circuit and district courts should be reversed; that the prize should be adjudged to the *Cadet*, and the case remanded for the assessment of reasonable damages in favor of the *Cadet.* But, considering that the prize arrived in safety, and probably in a more secure harbor than that for which she was sailing when seized by the *Paul Jones* (although it is certainly a case for damages), we are of opinion the damages should be moderate.

The facts in that case are quite similar to the facts in the present case. Here the dispossession of the French privateers by the Spanish armed vessel was clearly tortious as against France, but it was that tortious act against France that released the *Two Cousins*, and hence as against the United States was not tortious. Nor was the friendly act of towing the vessel to Habana a tortious act against the United States, especially as the vesesl was without a crew, except her master.

As the Spanish court clearly had jurisdiction to determine the question of possession, such decision can not be held a tort, even though possession was restored to the captor. Had Spain permitted the captor to resume possession of the vessel and sail her out of the port of Habana without judicial determination such act would have been a violation of her treaty obligations with the United States to protect American vessels in Spanish waters, and a claim might then have arisen against Spain as a *jointfeasor* with France.

The *Two Cousins* having been captured by the French privateer in the open sea, the decision to restore the vessel to the captor was strictly within the rules of international law, as abandonment of a captured vessel can only take place by the voluntary act of the captor and without cause. Hence, the forced abandonment of a vessel, as in the present case, can not be regarded as a desertion thereof by the captor, nor would a belligerent captor under such circumstances be deprived by a neutral of any rights they might have acquired by virtue of the capture. (The *Mary,* Thomas, *supra.*) In other words, in the language of the court in the case of McDonough v. Dannery (3 Dall., 188, 198):

> In determining the question of property, we think that immediately on the capture the captors acquired such a right as no neutral nation could justly impugn or destroy; and, consequently, we can not say that the abandonment of the *Mary Ford*, under the circumstances of this case, revived and restored the interest of the original *British* proprietors.

We think the same rule may be applied in the present case; France, through her privateer, having made the capture, the captor had plenary dominion over the captured property, and that right could not be diminished by the subsequent forcible abandonment, even though the act of Spain be deemed a capture. (*The Mary,* Thomas, *supra,* 1 C. Rob., 135, 139; *The Cosmopolite,* 3 C. Rob., 333.)

If the captor had abandoned the prize, Spain, when her vessel of war took possession, would have been entitled to salvage (McDonough v. Dannery, *supra*), but Spain did not regard the vessel as a deserted one. On the contrary, the Spanish court held that the captor had not abandoned the vessel and was therefore entitled to possession. If the action of the Spanish vessel had been wrongful as against the *Two Cousins,* the master of the latter would have been entitled not only to restitution, but to damages under the authorities heretofore cited, but no such claim was made. On the contrary, each party was required to pay the costs he had made and to share equally the costs made in common.

The capture of the vessel by the French privateer, being illegal, was a tort, and the forcible abandonment of the vessel can not be taken advantage of by France as a defense on the theory of the primary liability of Spain, who forced the abandonment, as the captor not only denied the abandonment but persisted in claiming the vessel by procuring her condemnation in French territory and then relying upon that decree to secure both from the Spanish authorities and the master of the *Two Cousins* the release of the vessel. It is therefore clear that France could not set up by way of defense that because Spain is liable therefore France is exonerated.

Nor can it be said that the facts of this case render Spain liable at all, unless she has made herself liable by subsequent treaties, and as to that let us examine.

By the treaty of August 11, 1802 (8 Stat. L., 198), a board of commissioners was provided for to receive all claims by the subjects and citizens of the respective nations claiming "compensation for the losses, damages, or injuries sustained by them in consequence of the excesses committed by Spanish subjects on American citizens."

That treaty was followed by the one of February 22, 1819 (8 Stat. L., 252), by which Florida was ceded to the United States in consideration of $5,000,000, to be applied by the United States in exonerating Spain from all demands in future on account of the claims of their citizens to which the renunciations contained in the treaty extend, and by the ninth article of said treaty the respective parties renounced "all claims for damages or injuries which they, themselves, as well as their respective citizens and subjects, may have suffered until the time of signing the treaty."

On behalf of the United States it was provided therein that the renunciations should extend —

1. To all the injuries mentioned in the convention of August 11, 1802, heretofore referred to.
2. To all claims on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain.
3. To all claims of indemnities on account of the suspension of the right of deposit at New Orleans in 1802.
4. To all claims of citizens of the United States upon the Government of Spain, arising from the unlawful seizures at sea, and in the ports and territories of Spain, or the Spanish colonies.
5. To all claims of citizens of the United States upon the Spanish Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State, or to the minister of the United States in Spain, since the date of the convention of 1802 and until the signature of this treaty.

No "losses, damages, or injuries" were sustained by the claimants herein by reason of excesses committed by Spanish subjects under the treaty of 1802.

Nor did the claim herein arise under the second or third class mentioned in the treaty of 1819, or under the fourth class, as the forcible dispossession of the captor, followed by towing the *Two Cousins* into Habana, was not a wrongful seizure at sea. The claim does not fall within the fifth class, as it is not shown that the claim was presented to the State Department as therein provided as a claim against Spain prior to the signing of the treaty of 1819.

But the defendants contend that because the claim was presented to the commissioners appointed under the treaty of 1819, therefore the claimants elected to look to Spain and by that act released France.

The claim herein was not a claim against Spain, either separately or jointly, and therefore did not fall within the class of claims renounced by the United States. Hence its presentation to the commissioners under the treaty of 1819 did not operate as an election, as an election in such a case presupposes a joint liability. France was alone liable for the illegal capture and condemnation, and continued to persist in her wrongful act, and therefore the filing of the claim before the commissioners under the treaty of 1819 and its disallowance because of insufficient testimony can not avail as a defense to France and therefore not to the United States.

Where one has inconsistent rights or remedies of which he may avail himself, a choice of one is held an election not to pursue the other, but that rule does not apply to coexisting and consistent remedies. (F. C. Austin Mfg. Co. v. Decker, 80 N. Y., 8; N. Y. Land Improvement Co. v. Chapman, 118 N. Y., 288.)

But here the question is not one of inconsistent remedies or rights against the same party, but whether two nations are liable as joint tort feasors for unlawful captures of American vessels or whether Spain is liable separately for the loss of the *Two Cousins* and her cargo by reason of excesses committed by Spanish subjects on American citizens. As Spain is not shown to have aided France in any unlawful way, she can not be charged with joint liability therewith, and as the act of Spain was not unlawful as against the United States, no separate liability arose against her in favor of the claimants; and hence the filing of a claim against Spain under the treaty of 1819, under the circumstances of this case, did not operate as an election releasing France.

In the case of *The Reliance* (37 C. Cls. R., 262), where the vessel was seized in Swedish waters and carried into a Swedish port, and while there condemned by a French court sitting in French territory, the court held, on the motion for a new trial (41 C. Cls. R., 67), that the United States had the right to present the claim either to Sweden, who owed protection to the American vessel, or to France, who seized the vessel; and, further, that the owners had the right to ask their Government to prosecute the claim against either one or the other offending parties; and, having filed the claim in the State Department, requesting the United States to ask satisfaction from the Swedish Government, it was an election, so far as the owners of the vessel could make it, to hold the Swedish Government; and that being true, it was not one of the claims relinquished by France in consideration of the relinquishment of France of her claims against the United States.

In that case the seizure was in Swedish waters, and, therefore, Sweden by not protecting the vessel violated her treaty with the United States, which rendered her a tort feasor with France, if not primarily liable, and hence the owners by electing to look to Sweden, it was held, thereby relinquished their claims against France.

In the present case, as the claim was never one against Spain, either separately or jointly, but arose by reason of the illegal capture and condemnation by France, it was one of the claims released by the second article of the treaty of 1800 in consideration of the release by France of certain claims of her citizens against the United States.

Spain being a neutral, her wrong was against France, which she judicially recognized by decreeing possession of the vessel to the captor. That is to say, the *status quo* of the captured vessel was restored to the captor, and no damages were claimed by the master of the *Two Cousins* against Spain for her acts.

Even if the master of the privateer had directed the prize master to take the captured vessel into a Spanish port it would not have been an illegal act (*The Hiram,* 41 C. Cls. R., 12). If not, and while there a controversy had arisen as to who was entitled to the possession of the captured vessel, the courts of Spain would have been open to adjudicate that question. Nor would Spain have rendered herself liable by permitting the sale of an American vessel under a decree of a prize court sitting in French territory (Ship *Star,* 35 C. Cls. R., 387).

Respecting the insurance on the vessel effected subsequent to the capture, the court, in the case of the schooner *John Eason* (37 C. Cls. R., 443), held that where the captured vessel had been insured after its condemnation the premium therefor was not a charge against France, as the liability of France was limited to the value of the property at the time of the illegal seizure or condemnation. In that case the insurance was effected after the condemnation, while in the present case the insurance was effected before the condemnation but after the illegal seizure, and we think that the same principle applies, as the liability of France could not be augmented subsequent to the illegal seizure, though the insurance between the parties was valid.

The court's conclusions are that the claimants are entitled to the allowance set forth in the findings, which findings, together with this opinion, will be certified to Congress.

## GUILLERMO ALVAREZ Y SANCHES V. THE UNITED STATES

(Decided October 28, 1907.)

*42 United States Court of Claims, 458*

PEELLE, Ch. J., delivered the opinion of the court:

To the petition filed herein the defendants interpose a demurrer, assigning as ground therefor "that the petition does not allege facts sufficient to constitute a cause of action."

The facts averred and which are material to the case are that the claimant, a native citizen of the island of Porto Rico, did, on the 8th day of April, 1878, purchase from one Florencio Berrios y Lopez for a valuable consideration a certain purchasable office known as "numbered produrador of the courts of first instance of the capital of Porto Rico," at Guayamo, in perpetuity, and that the provisional patent issued therefor by the governor-general of said island was, on or about October 31, 1881, approved by the King of Spain through the Minister of the Colonies of the Kingdom of Spain, in accordance with the laws, practice, and custom of the Kingdom of Spain, by virtue of which it is averred that the claimant "became vested with all the rights and privileges appurtenant to said office under said laws," which said office was then and there reasonably worth $200 per month; and that being thus clothed the claimant exercised all the rights and privileges pertaining to said office of procurador or solicitor from the time said office was confirmed in him until August 31, 1899, when said office was abolished, as hereinafter set forth.

That the United States took possession of said island during their war with Spain and maintained a military government therein from about October, 1898, to April 30, 1900. That while in the possession and military control of said island, to wit, December 10, 1898, the treaty of peace between the United States and the Kingdom of Spain was concluded, and having been signed by the respective plenipotentiaries at Paris was subsequently ratified by the respective Governments, which ratifications were, on April 11, 1899, exchanged at the city of Washington, and on the same day proclaimed by the President.

That by virtue of article 2 of said treaty the island of Porto Rico was ceded to the United States; and by article 8 it was "declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals of whatsoever nationality such individuals may be," etc.

That the office so purchased and held by the claimant was on said 31st day of August, 1899, abolished by General Order No. 134, issued by General Davis, in command of said island as military governor thereof, paragraphs 11, 12, and 13 of which are as follows:

> XI. The office of solicitor ("procurador") is *abolished.* Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of municipal courts.
>
> XII. Hereafter litigants who do not appear personally shall be represented before the Supreme Court and district courts *exclusively by a lawyer,* no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur.
>
> In the municipal courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place.
>
> XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court.

That said order was issued without any notice whatever to the claimant and without complaint as to the manner in which the claimant was exercising the duties of said office.

That thereafter by section 8 of the act of April 12, 1900 (31 Stat. L., 77, 79), being an act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," Congress ratified, among others, said order in these words:

> SEC. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States * * * .

That the claimant by virtue of the laws of Spain had a vested property right in and to said office at the time the general order was issued, and that by reason of said order the claimant was deprived of the right to discharge the duties of said office and to receive the emoluments thereof to his loss and damage in the sum of $50,000.

The substance of the facts averred is that the claimant held by purchase in conformity with the laws, usage, and customs of the Kingdom of Spain in force in the island of Porto Rico the office of procurador or solicitor in perpetuity, the salary of which was about $200 per month, and that by virtue thereof he had a vested property right in and to said office when the same was abolished as aforesaid, and that the abolition of said office operated as a taking of private property for public purposes, for which no compensation has been made.

The defendants, without plea thereto, raise the question of jurisdiction, claiming, in substance, first, that the act of the commanding general as military governor in abolishing the office so held by the claimant was wrongful and unlawful and, therefore, tortious, and being tortious this court is without jurisdiction. We can not agree with the defendants that the act abolishing said office was unlawful or wrongful, though so averred in paragraph 10 of the petition. The order issued abolishing the office was in conformity with the laws and usages governing the change or modification of the laws of newly acquired territory by conquest or cession; and being within the possession and rightful powers of the United States as the conqueror, the act abolishing the office was not tortious, and for that reason the defendants' contention can not be sustained.

Second, the defendants further contend that whatever claim exists in favor of the claimant grows out of and is dependent upon the treaty between the United States and the Kingdom of Spain, by which said island was ceded to the United States, and that, therefore, under Revised Statutes, section 1066, this court is prohibited from taking jurisdiction. But even if said section has not been repealed by the Tucker Act, we think the contention is untenable, because the claim as averred, if it exists, arises out of the act of the general in command of said island as military governor in abolishing the office, and not out of the treaty.

If, when the office was abolished, the claimant had any property right therein, then such right was preserved to him by article 8 of the treaty; but in the view we take the claimant had no property right in the office at the time of the issuance of said order; and having no property right therein, there is no claim growing out of or dependent upon the treaty; hence the defendants' contention can not be sustained.

This brings us to the main question in the case, *i. e.*, Did the claimant at the time of the issuance of the order abolishing the office have any property right in the office which he held; and, if so, did said order operate to deprive him thereof for the public use?

During the war with Spain the United States, in the exercise of their belligerent right, took possession by military force of the island of Porto Rico, then under the dominion and sovereignty of Spain, and, as averred in paragraph 9 of the petition, maintained a military government in said island from about October, 1898, to April 30, 1900.

When the United States thus took and maintained possession of said island, the sovereignty of Spain was thereby appropriated by them, and the inhabitants of said island became subject to the will of the United States, though their private rights and their relations to each other remained the same. (*The Fama,* 5 C. Rob., 126; United States v. Percheman, 7 Peters, 86; United States v. Hayward, 5 Gallison, 52.)

And as the military occupation of said island was firm, the United States, by virtue thereof, acquired all the rights of the displaced sovereignty, including the right to acquire complete title at least to all movable property of a public character belonging to Spain, and as well the public offices therein having to do with the administration and execution of the laws in said island. (United States v. Rice, 4 Wheat., 246-254; Fleming v. Page, 9 How., 603-615.)

When the Treaty of Paris of December 10, 1898 (30 Stat. L., 1754), was negotiated, the principle of *uti possidetis* was recognized, *i. e.*, the right to retain possession of the territory acquired by force during the war, and as there is no stipulation in the treaty to the contrary, the island was left in the state in which it was found. Hence, the title of the conqueror in the public movable property as well as to the public offices created by the sovereignty of Spain could not thereafter be questioned. (Wheaton's International Law, sec. 545.)

However, whether the island be considered as acquired by conquest or by cession on the basis of possession of the territory by force, the inhabitants in either case became subject to the sovereignty of the United States, the difference in substance being that in case of conquest confirmed by a treaty grounded on the principle of *uti possidetis,* the sovereignty is appropriated, while if acquired by expressed cession the sovereignty is transferred by the act of the State making the cession: (Hall's International Law, sec. 206.) The former, however, was the course which Spain was forced to pursue; that is, by virtue of the military possession of the island, Spain was forced, as a condition of peace, to cede to the United States the island so acquired and held, not that the cession was necessary to give to the United States the sovereign control of the island, but it operated to confirm in them all the rights which they had theretofore acquired by conquest.

The release of the island from the sovereignty of Spain, whether effected by coercion or by conquest, imposed no obligation upon the United States to indemnify those who may have suffered loss of property by such cession. (1 Kent's Commentaries, p. 178.) If, therefore, the claimant's loss of property in the office he held by purchase was due to the cession so made, rather than by conquest, no liability attached to the United States to make compensation therefor.

Conceding that prior to the conquest the claimant had, as between himself and Spain, a property right in the office, such right under the laws of Spain existed only by virtue of said office being a salable one in perpetuity, which office and tenure rested wholly in the sovereignty of Spain, so that when the sovereignty of Spain was displaced and superseded by the sovereignty of the United States and confirmed by the treaty without any words therein making the office perpetual in the claimant under the sovereignty of the United States, all right of property in and to said office was lost by the withdrawal of the sovereignty of Spain.

After the conquest of the island and the confirmation thereof by the treaty as aforesaid, the claimant, if he continued to hold said office, did so at the sufferance and will of the United States, and no right of property in said office can be predicated on such continuance in office.

The office so held by the claimant, as well as all other offices having to do with the execution and administration of the laws in force in said island, were subject to the will and control of the United States exercised through the President as Commander in Chief of the Army and Navy of the United States, or the Congress; and being so subject, and there being no restrictive words in the treaty, the claimant could have been removed from office or the office abolished, as was done at the will of the President acting through the military governor, without imposing upon the United States any obligation to compensate the incumbent of said office for any loss he may have sustained thereby. True, under the rules of international law, the laws, uses, and municipal regulations in force in the island at the time of the conquest or cession remained in force until changed by the new sovereign. (Mitchell v. The United States, 9 Peters, 711–735.) But such charge is an inherent right to be exercised at the will of the conqueror without condition or restriction unless imposed by the terms of the treaty.

As no right of property in the office held by the claimant was reserved to him by the treaty, none survived it, and therefore when the office was abolished the claimant had no property right therein which was the subject of a taking for public use.

The provisions of article 8 of the treaty, upon which the claimant relies for the preservation of his right of property, are merely declaratory of the rights which belong to the inhabitants of a territory acquired by conquest or treaty. That is to say, their rights of property not taken from them by order of the conqueror remain undisturbed. In other words, as before stated, the cession or conquest of territory does not affect the rights of private property. (*The Fama,* 5 C. Rob., *supra.*)

But in the present case, as the claimant's right of property was annexed to the public office which he held by purchase in perpetuity and existed wholly in the sovereignty of Spain, such right was exceptional, and in the absence of any words making the office perpetual in the claimant under the sovereignty of the United States, was taken away by the act of Spain when she withdrew her sovereignty. In other words, the claimant's exceptional right of property in the office which he held was not preserved to him by the terms of the treaty; and not being within the ordinary rules protecting the private property of the inhabitants of territory acquired by conquest or cession, he stands on no better terms than other public officers in said territory.

We have thus considered the case upon the theory of the claimant having, as between himself and Spain, a property right in the office which he held, though under the laws of the United States such office is a public trust in which the incumbent can have no property interest. (United States v. Hartwell, 6 Wall., 385–393.)

Nor is a public office with us the subject of sale, purchase, or barter. (Taylor v. Beckman, 178 U. S., 548–577.)

Nor can such office be termed a hereditament, or a thing capable of being inherited. (3d Kent's Commentaries, 454.)

The right to exercise an office in the United States is not based upon contract or grant, but is conferred as a trust to be exercised for the public benefit. (United States v. Hartwell, *supra.*) True, some of our States proceed upon the theory of the incumbent having a property right in the office, of which he can not be deprived without the judgment of a court, but such view has no foundation in a representative government. (Anderson's Law Dictionary, 727; State *ex rel.* Atty. Gen. v. Hawkins, 44 Ohio St., 199; Donahue v. County of Will, 100 Ill., 94.)

But we need not pursue the question any further, as there is no language in the treaty perpetuating the office in the claimant, and therefore it must be held that in respect to his right to the office in question he stands upon the same ground as other public officers in the island at the time of the cession of the territory.

For the reasons stated the demurrer must be sustained and the petition dismissed, which is accordingly ordered.

HOWRY, J., was not present when this case was tried and took no part in the decision.

## DOÑA MARIA FRANCISCA O'REILLY DE CAMARA, COUNTESS OF BUENA VISTA, V. JOHN R. BROOKE, MAJOR GENERAL, U. S. A.

*In the Supreme Court of the United States*

(March 16, 1908.)

Mr. Justice HOLMES delivered the opinion of the court:

This is a writ of error to review a judgment of the District Court dismissing a complaint purporting to be brought under Rev. Stat., § 563, the sixteenth clause of which gives the District Courts jurisdiction "of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States." 142 Fed. Rep. 858. See 135 Fed. Rep. 384. The plaintiff is a Spanish subject and alleges a title by descent to the right to carry on the slaughter of cattle in the city of Havana and to receive compensation for the same. (She does not allege title to the slaughterhouse where the slaughtering was done. That belonged to the city.) According to the complaint the right was incident to an inheritable and alienable office; that of Alguacil Mayor or High Sheriff of Havana. The office was abolished in 1878, subject to provisions that continued the emoluments until the incumbent should be paid. The plaintiff has not been paid, and in 1895 one-half of the emoluments was sold on execution by consent, the other half remaining to the plaintiff or those whom she represents. On May 20, 1899, the Island of Cuba being under the military jurisdiction of the United States, Brigadier General Ludlow, then governor of Havana, issued an order that the grant in connection with the service of the city slaughterhouse, of which the O'Reilly family and its grantees were the beneficiaries, was ended and declared void, and that thenceforth the city should make provision for such services. The owners were referred to the courts and it was decreed that the order should go into effect on the first of June. In pursuance of the same, it is alleged, the plaintiff was deprived of her property. She appealed to the defendant, then military governor of Cuba. On August 10 he issued an order, reciting the appeal, and stating that, it being considered prejudicial to the general welfare of Havana, etc., and in view of the cessation of Spanish sovereignty, the office of Alguacil Mayor de la Habana, together with all rights pertaining thereto or derived therefrom, was thereby abolished, and the right of claimants to the office or emoluments was denied. The city thereafter was to perform the services. It is alleged that by this action the plaintiff was prevented, and to this day has been prevented, from carrying out the duties and receiving the emoluments mentioned above. The complaint ends by alleging violation of the Treaty of December 10, 1898, 30 Stat., 1754, and of General Orders No. 101, of July 18, 1898, issued by the President through the Secretary of War. It also sets up the Constitution of the United States and the Spanish law in force before the Island was ceded by Spain.

The answer denies the plaintiff's right, but admits the passage of the order, and sets up a ratification by the United States in the so-called Platt Amendment of the Act of March 2, 1901, c. 803, 31 Stat., 897, to the effect that "all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected," afterwards embodied in the Treaty with Cuba of May 22, 1903. 33 Stat., 2249. The District Judge made a finding of facts, substantially supporting the allegations of the bill, which it is not necessary to set forth in detail, but stating one further public fact that should be mentioned. The plaintiff appealed to the Secretary of War to have General Brooke's order revoked. In answer, Mr. Secretary Root denied that the rights attached to the office of sheriff of Havana survived the sovereignty of Spain, observed that the services in question were in substance an exercise of the police power of the State, that the right to exercise that power under Spanish authority ended when Spanish sovereignty in Cuba ended, and that the petitioner had been deprived of no property whatever. In December, 1900, the United States ratified and adopted the action of General Brooke through an order of the Secretary of War, and again by the Act of Congress just mentioned and the Treaty of 1903. The judge was of opinion that, although there was a public nuisance in the slaughterhouse creek, General Brooke's order was not justified under the police power, but that by the ratification of the United States the plaintiff lost any claim against him. The judge intimated, however, that she had a just one against the United States under the Treaty with Spain.

We are so clearly of opinion that the complaint must be dismissed that we shall not do more than mention some technical difficulties that would have to be discussed before the plaintiff could succeed. In assuming that General Brooke's order permanently deprived the plaintiff of her rights, although they were attached to no tangible thing, and although General Brooke long since has ceased to be Governor of Cuba or to have any power in the premises, the plaintiff necessarily assumes that her rights follow the ancient conception of an office and are an incorporeal hereditament, susceptible of disseisin. 3 Kent, 454; Stat. Westm. II, c. 25; 2 Co. Inst., 412; U. S. Rev. Stat., § 563, cl. 13. If we are to apply that conception to the case, we are led to ask why the disseisin was not complete, upon the allegations of the complaint, before General Brooke had anything to do with the matter, or why the brief period during which his authority intervened should make him answerable not only for what had happened before, but also for the continued exclusion of the plaintiff by the United States and by the Government of Cuba. But it is very hard to admit that the notion of a disseisin can be applied for the present purpose to such disembodied rights any more than to copyrights or patents; and, if not, then all that General Brooke could be held for, if for anything, would be damages for the disturbances of the plaintiff while he was in power, which are not the object of this suit. It becomes impossible to go further than that when it is remembered that the United

States asserted no permanent sovereignty over Cuba, and that, as General Brooke could not carry the office with him, his interference must have lost all legal effect in a very short time.

Again, if the plaintiff lost her rights once for all by General Brooke's order, and so was disseised, it would be a question to be considered whether a disseisin was a tort within the meaning of Rev. Stat., § 563 (16). In any event, the question hardly can be avoided whether the supposed tort is "a tort only in violation of the law of nations" or of the treaty with Spain. In this court the plaintiff seems to place more reliance upon the suggestion that her rights were of so fundamental a nature that they could not be displaced, even if Congress and the Executive should unite in the effort. It is not necessary to say more about that contention than that it is not the ground on which the jurisdiction of the District Court was invoked.

Coming one step further down, we are met by an argument on the part of the defendant that the only things that we can consider are the pleadings and the judgment dismissing the complaint. It is urged with great force that the decision denying the power of a circuit judge to find and report facts for the consideration of this court upon a writ of error (Campbell v. Boyreau, 21 How. 223), although met as to the Circuit Court by Rev. Stats., §§ 649, 700, still applies to the District Courts. Rogers v. United States, 141 U. S. 548. However, if we assume this argument to be correct, there still perhaps may be gathered from the pleadings, coupled with matters of general knowledge, enough to present the questions which the plaintiff was entitled to present below, and therefore we proceed to dispose of the case upon the merits.

It is said that neither the Executive nor Congress could have taken the plaintiff's property, and that therefore they could not ratify the act of General Brooke so as to make his act that of the United States and to exonerate him. But it has been held that a tort could be ratified so far as to make an act done in the course of the principal's business, and purporting to be done in his name, his tort (Dempsey v. Chambers, 154 Mass., 330); and it may be assumed that this is the law as to the wrongful appropriation of property which the principal retains (*ibid.*, 332, and cases cited). The old law, which sometimes at least was thought to hold the servant exonerated when the master assumed liability (1 Roll. Abr., 2, pl. 7; 95 (T.); Cremer v. Tookley's case, Godbolt, 385, 389; Laicock's case, Latch, 187; Anon., 1 Mod. 209), still is applied to a greater or less extent when the master is the sovereign. *The Paquette Habana*, 189

U. S., 453, 465. It is not necessary to consider what limits there may be to the doctrine, for we think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a "tort only in violation of the law of nations, or of a treaty of the United States," it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress and the treaty-making power all have adopted the act. We see no reason to doubt that the ratification extended to the conduct of General Brooke.

But we do not dwell longer upon the ratification of what was done during the military occupation of Cuba, or consider the question whether the ratification was needed, because we agree with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it no longer could be exercised, the right remained so far that it was to be paid for, and if it had been paid for the right to the emoluments would have ceased. If the right to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States Government, and unless it did the plaintiff's case is at an end. *Judgment affirmed.*

## THE KING V. THE "NORTH"

### *In the Exchequer Court of Canada (British Columbia Admiralty District)*

[Decided August 25, 1905.]

Martin, J.:

This case raises important questions relating to the fisheries of this Province in general, and to the extensive and valuable halibut banks of Vancouver Island in particular.

There is, and can be, from the evidence, very little dispute about the facts, which are clear, and I find as follows: That on the morning of the 8th July last, the foreign schooner *North,* alleged in its statement of defense to be "navigated according to the laws of the United States of America," was hove to and unlawfully engaged in halibut fishing in Quatsino Sound, Vancouver Island, within the three-mile limit, having all its four fishing boats, dories, out for the purpose; that on observing the approach in obvious pursuit, within the three-mile limit and approximately four or five miles off, of the Canadian fisheries protection cruiser *Kestrel,* she picked up two of her dories and stood out to sea; that the *Kestrel* continued in pursuit at her highest speed in the attempt to intercept the *North;* that in the course of that pursuit the *Kestrel* observed another dory, close to, and pulling hard from the land towards the schooner, which dory the *Kestrel,* after slightly deviating from her course, picked up and seized within the three-mile limit, and after fixing her position by cross-bearings, continued her pursuit of the *North,* which she overhauled in about ten to twelve minutes and seized with the two first-mentioned dories, about one and three-quarter miles outside the three-mile limit. There were freshly caught halibut lying on the *North's* deck at the time of the seizure, which in all the circumstances must be held to have been caught within the limit. There were also several tons of halibut in her hold, but it can not be said where they were taken.

The schooner and the three dories were towed to Winter Harbor, Quatsino Sound, where the fourth dory was afterwards taken when it came in.

I may say that quite apart from the admission of the master of the *North* of his knowledge of wrong-doing, no difficulty is experienced here in regard to fixing the various positions in issue, as was the case in The King v. *The Kitty* (1904), 34 S. C., 673, because they were exactly established by cross-bearings.

So far as the two dories, taken within the limit, and their tackle, gear, and equipment are concerned, it was not argued that they were improperly seized, but as to the schooner and the other dories, it is contended on several grounds that the seizure thereof can not be justified.

The first is, that no seizure can be made on the high seas for an offense committed within the three-mile limit which is merely an infringement of municipal or local laws or regulations, and not a crime in the proper sense of that word, in which case it is admitted a seizure may be made where the pursuit is continuous. Here the pursuit was begun within the three-mile limit, and was clearly continuous, which, in fact, was not, nor could not be, seriously disputed, for it would be as unreasonable to contend that its continuity was broken by stopping to pick up within the limit one of the best evidences of the commission of the offense as it would be in the case of a constable in pursuit of a thief stopping to pick up the stolen article which the pursued threw away in the course of his flight. Indeed, the inference is stronger and the act more advisable in the case of a poaching vessel with her boats out in the ordinary course of fishing operations, because the boats are manned by members of her crew who are a living and active part and parcel of her engaged in breaking the law. See on the wide meaning of "fishing" and "preparing to fish" the case of The Queen v. *The Frederick Gerring, Jr.* (1896), 5 Ex., 164; 27 S. C., 271; the cases reported and cited in Stockton's Admiralty Digest (1894) on pages 200 and 598–600; those on the Behring Sea Seal Fishery in this court; and on the same subject in the United States Court of Admiralty, *The James G. Swan* (1892), 50 Fed. Rep., 108; *The Kodiak* (1892), 53 Fed. Rep., 126; and *The Alexander* (1894), 60 Fed. Rep., 914.

As regards the rights of merchant vessels in foreign ports, it was said in the leading case of R. v. Anderson (1868), L. R. 1, C. C. C., 161, at 166, that "when vessels go into a foreign port they must respect the laws of that nation to which the port belongs," though they may be there still subject to the laws of their own country as though they were on the high seas. *Ib.* and R. v. Carr (1882), 10 Q. B. D., 76; Marshall v. Murgatroyd (1870), L. R. 6 Q. B., 31.

It has likewise been repeatedly laid down by the Supreme Court of the United States, adopting the language of Chief Justice Marshall in the celebrated case of *The Exchange* (1812), 7 Cranch, 116, at 143, that "when merchant vessels enter [foreign ports] for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation if such * * * merchants did not owe temporary allegiance, and were not amenable to the jurisdiction of the country." Followed in United States v. Dickelman (1875), 92 U. S. R., 520; and Wildenhus' Case (1886), 120 U. S. R., 1.

There is no case in the English or Canadian reports on this first point, but it has been dealt with by American courts. That of Church v. Hubbart (1804), 2 Cranch, 187, is a case where an American ship was seized by the Portuguese Government outside of the three-mile limit for a violation of the prohibition of the Crown of Portugal against all trade by foreigners with its colonies, or hovering off their coasts for that purpose. The Supreme Court of the United States held, in its judgment delivered by Chief Justice Marshall, pages 234–235, as follows:

> As a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their waters or hovering on their coasts in a condition to trade, and be afterwards governed in their proceedings with respect to those vessels, by the circumstances which shall appear in evidence. * * * That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, can not be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation, within its own territory, is absolute and exclusive. The seizure of a vessel, within the range of its cannon, by a foreign force, is an evasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas, for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself, by the assistance intended for his enemy; so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

And again, page 236:

> Indeed the right given to our own revenue cutters to visit vessels four leagues from our coast is a declaration that in the opinion of the American Government no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the *Aurora*, by the Portuguese governor, was an act of lawless violence.

In Rose v. Himely (1808), 4 Cranch, 240, the majority of the judges of the same court gave a decision which, it is true, can not be reconciled with that just cited, but I draw attention to the fact that three of the judges, Livingston, Cushing, and Chase, JJ., did not express themselves on the present point, and Mr. Justice Johnson dissented. But the matter must, in my opinion, be considered as settled by the subsequent case of Hudson v. Guestier (1810), 6 Cranch, 280, decided by the same court, wherein Rose v. Himely is overruled, all the judges concurring, with the exception of Chief Justice Marshall, who gives an explanation (page 285) of his misapprehension in regard to his former view being shared by certain of his colleagues. In that case it was held that a ship may be seized on the high seas for a breach of municipal regulations committed within the territorial jurisdiction. The court said:

> If the *res* can be proceeded against when not in the possession or under the control of the court I am not able to perceive how it can be material whether the capture was made within or beyond the jurisdictional limits of France, or in the exercise of the belligerent or municipal right. By a seizure on the high seas she (France) interfered with the jurisdiction of no other nation, the authority of each being there concurrent.

In that case the capture was more than two leagues at sea, and the ship was condemned for trading to the revolted ports of the island of Hispaniola contrary to the ordinances of France.

The Supreme Court of Louisiana, in Cucullu v. Louisiana Insurance Company (1827), 16 American Decisions, 199, followed the principle laid down in Church v. Hubbart, *supra*, and said:

> The right of a nation to protect itself from injury by preventing its laws from being evaded is not restrained to this boundary (three miles). It may watch its coasts and seize ships that are approaching it with an intention to violate its laws. It is not obliged to wait until the offense is consummated before it can act. It may guard against injury as well as punish it. If indeed, in the exercise of this right, an unreasonable range was taken, other nations might object. But so long as it is confined to the seizure of vessels entering the port for which they are destined, it will not, it is presumed, form a just ground of complaint. Our own legislation authorizes revenue cutters to visit vessels four leagues from the coast; and the acts of Congress on this subject are a clear expression of the opinion of our Government, that nothing in the law of nations prohibited them to confer such power on its cruisers.

And *a fortiori*, the right would exist after the territorial waters had been actually entered and violated.

This view is, as would be expected, to be found in the text-books on the subject, and I proceed to give extracts from the latest of them. Woolsey on International Law, a writer of repute on the subject, says (6th ed., 1898), page 71, par. 58:

> For a crime committed in port a vessel may be chased into the high seas and there arrested, without a suspicion that territorial rights have been violated,

> while to chase a criminal across the borders and seize him on foreign soil is a gross offense against sovereignty.

Again, page 365, paragraph 212:

> It is admitted by all that within the waters which may be called the territory of nations, as within a marine league, or in creeks and bays, the vessel of a friendly state may be boarded and searched on suspicion of being engaged in unlawful commerce, or of violating the laws concerning revenue. But further than this, on account of the ease with which a criminal may escape beyond the proper sea line of a country, it is allowable to chase such a vessel into the high sea, and execute the arrest and search which flight had prevented before. Furthermore, suspicion of offenses against the laws taking their commencement in the neighboring waters beyond the sea line, will authorize the detention and examination of the supposed criminal.

Taylor on International Public Law (1901), page 307, par. 262. points out that a merchant ship is not entitled to the protection of its own state on the high seas on an escape thereto "after an infraction by such vessel, or by someone on board, of the laws of a foreign state while within its territorial waters." Again, on page 310, par. 267:

> In the same way a state, in whose territorial waters a private vessel, or someone on board of her, has committed an offense against its laws, may pursue her into the open sea and there seize her, provided the pursuit was begun while the vessel was still in such waters, or just after her escape from them.

Though, as I have said, there is no case in England on the point, yet the text writer, who is perhaps the highest authority on the subject — I refer to the late Mr. W. E. Hall's treatise on International Law, fourth edition (which I see is stated in Jelf in "Where to find your Law," 2d ed., 1900, p. 355, to be the "most concise, accurate, and logical treatise on the subject which is extant at present in any language" — deals with it in a way which confirms the view of the American authorities as above cited. On pages 213–215 he says:

> At the same time it is evident that the interests of the state are confined to acts taking effect outside of the ship. The state is interested in preventing its shore fisheries from being poached, in repressing smuggling, and in being able to punish reckless conduct endangering the lives of persons on shore, negligent navigation by which the death of persons in other ships or boats may have been caused, and crimes of violence committed by persons on board upon others outside; and not only is it interested in such cases, not only may it reasonably be unwilling to trust to justice being done with respect to them by another state, it is also more favorably placed for arriving at the truth when they occur, and consequently for administering justice, than the country to which the vessel belongs can be.

And further:

> It seems then reasonable to conclude that states, besides exercising such jurisdiction as is necessary for their safety and for the fulfillment of their international duties, ought to reserve for themselves such ordinary jurisdiction as it is necessary to maintain customs and other public regulations within their territorial waters, and to provide, both administratively and by way of civil and criminal justice, for the safety of persons and property upon them and the adjacent coasts.

Again, page 263:

> It is admitted by the most thorough-going asserters of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or someone on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade.

Again, page 266:

> It has been mentioned that when a vessel, or someone on board her, while within foreign territory commits an infraction of its laws she may be pursued in the open seas and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful.

And Phillimore, in his Commentaries upon International Law (Am. ed., 1854), vol. 1, p. 179, par. cxvii, says:

> This is the limit (range of cannon shot, *i. e.*, three miles) fixed to absolute property and jurisdiction; but the rights of independence and self-preservation in time of peace justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit. * * *

The case of Church v. Hubbart is referred to in the American note, but the editor does not seem to have been aware of the later and broader decision in Hudson v. Guestier.

This distinction between seizures made upon the high seas, which are the exclusive property of no nation, and the general property of all nations, and seizures made within the territory of another state is, I find, illustrated in a striking manner by Lee on Captures in War (1803), 123, wherein he lays it down in the case of war, though it is said to be " the most that can be allowed," that —

> During the engagement, it is lawful to pursue the flying enemy into another government; for the same reasons as Philip the Second, King of Spain, in an edict he published relating to criminals in the year 1570, par. 76, permitted the delinquent to be pursued into the territories of another. But it is one thing to begin force, and another to press forward with force in the heat of action. In a word, the very being in the port of a friend forbids us to commence any force there; but it does not prohibit the use of any force which was begun without the bounds of his territory, while the matter is warm; for we may then pursue it into the very territory of our friend. And though this is a question little noticed by writers on public justice, yet this distinction appears quite reasonable.

Over the waters within the three-mile limit the chief heads of jurisdiction generally asserted by nations are four: (1) The prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling, and (4) the policing of fisheries; and this last, involving the assertion and protection of the exclusive right of its subjects to fish within said limit, is certainly not the least important duty of a state. So far as this continent is concerned it is of much consequence in view of the great value of the fisheries, and this "police jurisdiction" by the two nations chiefly concerned, Canada and the United States, has been acquiesced in for a long period, and is admitted, so it is unnecessary to discuss it. As regards the North Atlantic fishery, its history is given by Wharton in his International Law Digest (1886), vol. 3, pars. 300–301; and see Hall's International Law, *supra,* 99 and 154, on British-American fisheries generally. Though poaching the fisheries of a friendly nation is not essentially a crime, yet, as was said by the Supreme Court of Canada in The Queen v. *Frederick Gerring, Jr., supra,* it is a "nefarious business," and one which, " so far as Canadian waters are concerned, has been prohibited and criminalized," and the cases hereinbefore cited show that the Governments of Canada and the United States have endeavored rigidly to suppress the depredation of their waters by foreigners.

It follows from all the foregoing that the seizure herein was lawful. Such being the case it becomes unnecessary to consider the question of the alleged extent of Quatsino Sound from Cape Cook to Topknot

Point, on the "headland to headland" theory, which raises a very involved question, which I see has been in recent years considered by the Supreme Court of Newfoundland in Rhodes v. Fairweather (1888), 1 Newfoundland Dec. 321; see also an appeal from that court on the same question in Direct U. S. Cable Co. v. Anglo-American Teleg. Co. (1877), 2 A. C., 94; and Mowat v. McFee (1880), 5 S. C., 66.

The remaining question is that the Government of Canada, as a result of the Fisheries Case (1898), A. C., 700, is not vested with the authority to prevent anyone from fishing, and has no status except for revenue purposes — in other words, that while it has the right to control it has not the right to absolutely prohibit foreign nations, and that it is the Province of British Columbia and not Canada that has, if anyone has it, the right of property in the fish, and therefore the Federal Government has no police jurisdiction. In view of the long-continued, undisputed exercise of this right by the Federal power, as shown by a perusal of the cases already cited, and others, such as *The Grace* (1894), 4 Ex., 283; and The Queen v. *The Henry L. Phillips* (1895), *Ib.*, 419; 25 S. C., 691, it would seem to be somewhat late to raise the point. Indeed, it has been laid down in the former case, page 288, as follows:

> Now it is also an axiom of international law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects, and therefore the act respecting fishing by foreign vessels is strictly within the powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights.

And then follows the reference to the statute showing that it does in its first section provide for the issue of a license to a foreign ship, and the onus is upon such ship when fishing in our waters to prove its possession of a license. The Queen v. *The Henry L. Phillips, supra.* Here there is no evidence of a license, nor of the nationality of the owners; all before the court on that point is that the vessel was navigated according to the laws of the United States. It was laid down in the Fisheries Case, 713, that —

> It is impossible to exclude as not within this power (raising money) the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of section 92 the Provincial Legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this can not, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

And further:

> The enactment of fishing regulations and restriction is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of provincial legislatures.

While these rights are not proprietary, they are manifestly of such a nature that it is within the competence of the Federal power to exercise the sovereign rights which have been delegated to it by the British North American Act, and protect, in the interest of the nation at large, those fisheries which it authorized to regulate and license. I can find nothing in the Fisheries Case, which goes to support a contrary view.

The judgment of the court is that the schooner *North,* her boats, tackle, rigging, apparel, furniture, stores, and cargo, are condemned and declared forfeited to His Majesty.

Having disposed of the legal questions, it remains for me to say, with regret, that there has been an occurrence of an unusual nature in connection with this action, which, having regard to the future, I feel it would not be right to wholly pass over. My attention has been called to the fact that in its issue of the 8th inst. the Colonist newspaper has published an alleged interview with one of the witnesses in the case, E. G. Taylor, fisheries inspector, in the course of which the opinion is expressed, before the court had determined the question, that the accused ship was guilty of the offense charged. The impropriety of publishing comments on judicial proceedings while the judgment of the court is pending is so well recognized that it is observed by all respectable and right-minded people, quite apart from the fact that as an obstruction of justice it is an offense for which all concerned can not evade responsibility. In the present case, in view of the fact that international relations with a friendly power are affected in a matter of nicety and unusual importance, it is so manifest that care should have been taken not to give cause for complaint, that I am forced to believe the publication is merely the result of ignorance and inadvertence, and since no formal motion has been made I think this warning will be sufficient for the future guidance of those concerned. It is, I am glad to say, the first time in Canada that I have seen the opinion of a witness so published, and I trust it will be the last, for such a proceeding is wholly foreign to our institutions. So far as the witness himself is concerned, I am loath to believe that one who is a public official and actively interested in this very prosecution should so far have forgotten himself as to speak in the way attributed to him, and consequently I shall not assume he has done so, but shall content myself with bringing the matter to the attention of the head of the officer's Department, the Honorable the Minister of Marine and Fisheries, so that it may be investigated.

(On Appeal)[1]

*In the Supreme Court of Canada.*

Davies, J.:

The *North* was an American fishing schooner and was found by the Dominion fishing cruiser *Kestrel* on the 8th July, 1905, fishing off the coast of British Columbia within the three-mile limit or zone.

On being discovered, the poaching schooner immediately endeavored to escape into the high seas beyond the three-mile limit. She was at once pursued by the *Kestrel,* and two of her boats which were out fishing and which she was unable to pick up, while endeavoring herself to escape, were captured. The schooner was not overtaken till she had passed out beyond the three-mile limit into the high seas. She was at once taken possession of for illegal fishing, brought into port, libelled in the Admiralty Court and after trial condemned.

Some questions were raised on this appeal by Mr. Wilson as to the legality of the condemnation on the ground that the fisheries along the coast belonged to the Province and not to the Dominion and that the legislation for their protection should have been provincial and not Dominion. The simple answer to such objections is that the B. N A. Act conferred upon the Dominion the exclusive power of legislation with respect to seacoast and inland fisheries and that the judgment of the Judicial Committee in the case of In Attorney-General of Canada v. Attorney-General of Ontario, 1898, A. C., page 700, determines affirmatively the exclusive right of the Dominion Parliament to make or authorize the making of regulations and restrictions respecting the fisheries of Canada.

The *North* being a foreign schooner, was charged with the offense of fishing within three miles from the seacoast without a license against the provision of the Dominion statute R. S. C. Cap: 94. Though not formally abandoned on the appeal, it was not contended that the evidence of the vessel's guilt was defective or insufficient. The appeal was rested solely on the ground that when the schooner was actually overtaken and seized, she had passed out of the three-mile limit into the high seas and that the officers had no right under the statute in such circumstances to make the seizure and bring her into port, and that the subsequent condemnation of the schooner was therefore illegal.

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[1] This report is taken from the manuscript report of the decision and may, therefore, contain slight inaccuracies.

The ground taken by Mr. Wilson was that a true construction of the Dominion statute did not authorize any of the officers clothed with authority, to seize fishing vessels poaching in the territorial waters of Canada, to follow such vessels outside of the three-mile limit, although found committing the offense within that limit, and that any seizure made outside of such limits, even when made in hot pursuit of the offender, was without authority and illegal.

To confer such a power, Mr. Wilson contended that two things must exist: First, a treaty between the nation whose ship was charged with the offense authorizing the seizure on the high seas beyond territorial waters, and municipal legislation in furtherance of that treaty.

I am quite unable to agree with those contentions. I think the Admiralty Court, when exercising its jurisdiction, is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws, either for the protection of its fisheries or its revenues or coasts, she may be immediately pursued into the open seas beyond the territorial limits and there taken. As Mr. Hall observes in the book upon International Law, 4th ed., at page 267:

> It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun or which but for the accident of immediate escape would have been begun within the territory itself and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.

This clear, terse statement of the law and the reason for it, is amply sustained by the array of authorities cited by Martin, J., the local judge in Admiralty, in his judgment. The right of hot pursuit of a vessel found illegally fishing within the territorial waters of another nation being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.

The language of our statute does not limit the powers of the officers entrusted with the protection of our seacoast fisheries to their "exercise" within the three-mile limit. That language is, I think, quite broad enough to cover such a case as the one before us, and the fourth section of the statute, so far from negativing the doctrine of immediate or hot pursuit of a poacher, impliedly invokes and adopts it. I do not agree that any special treaty is necessary to enable a nation to protect its fisheries within the zone prescribed by the law of nations or that unless such a treaty exists embodying the doctrine of hot pursuit of a vessel found illegally fishing within territorial waters such vessel is immune from seizure once she passes beyond those waters into the high seas.

The laws of a state can only, as Mr. Hall says, run outside its territorial waters against the vessels or subjects of another state with the express or tacit consent of the latter. Municipal legislation embodying the doctrine of the law of nations with respect to seizure of foreign vessels beyond territorial jurisdiction would not confer any additional authority as against a foreign ship to that embodied in international law from which alone the right to seize a foreign vessel beyond territorial waters for infraction of municipal law within those waters can be obtained. No such legislation as that contended for as necessary by Mr. Wilson exists, as far as I am aware, in the British Dominions, nor did he cite any precedent from the legislation of any foreign country. I am quite satisfied that the existing legislation of the Dominion is sufficient and that the seizure of the *North* under the facts of this case as practically admitted was legal.

But even if there was a reasonable doubt as to the power of the officers of the cruiser to seize the schooner on the high seas beyond the three-mile limit, under the circumstances before us, I am of the opinion that such irregularity could not affect the jurisdiction of the Admiralty Court to hear and determine the offense charged against the schooner. That offense being within the jurisdiction of the court, and the vessel being also within such jurisdiction and properly attacked and libelled, could not plead an alleged irregularity in the mode of her being taken on the high seas as a defense.

If the manner in which she was brought into port and within the jurisdiction of the court was wrong or irregular, it was matter for diplomatic protest at the instance of the country to which she belonged or for civil action by the owners of the ship. If that country does not complain of any offense against its honour and dignity, the ship libelled can not do so. If the poaching schooner had escaped into the territorial waters of her own country and had been chased there and captured and brought back, the government of that country might well justify intervention. But short of such intervention, I think the ship charged with illegal fishing within the three-mile limit being within the jurisdiction of the Admiralty Court and properly libelled there for an offense committed within its jurisdiction, proceedings can not be defeated or the jurisdiction of the court ousted merely by an irregularity in the taking of the ship.

The principle underlying the decisions relating to persons kidnapped and brought before magistrates having jurisdiction over the offense with which they are charged are, I think, in point. Those cases show that the remedy for the illegal arrest and the kidnapping of the prisoner is by proceedings at the instance of the government of the foreign country whose laws or territory has been violated or at the suit of the injured party against the trespasser.

*In re* Walton, 11 A. R., page 94, where many cases in point are cited. See also the Queen v. Hughes, 4 Q. B. D., page 814, where a very strong court of ten judges held, with one dissent alone, that a person being before justices and charged with an offense over which they had jurisdiction in respect of time and place, no irregularity in his arrest or bringing before the court could avail to impeach their jurisdiction to try him.

The remedies of the prisoner for illegal arrest or detention remained unimpaired but the jurisdiction of the court was unquestionable and unaffected by the manner in which the prisoner was brought before it.

I think the appeal should be dismissed with costs.

IDINGTON, J.:

This is an appeal from the condemnation of the appellant in the Exchequer Court. The learned trial judge, Mr. Justice Martin, sitting in the British Columbia admiralty district, found that the appellant ship had become liable to forfeiture under the provisions of the "Act respecting Fishing by Foreign Vessels," c. 94 of R. S. of Canada.

The ship was fishing within the three-mile limit on the coast of British Columbia. When observed, she fled and was captured outside the three-mile limit.

There seems to be no real contention about the findings of fact, though not admitted to be absolutely correct. The appeal raises several questions of interest and some of them of considerable importance.

The appellant's counsel did not rest the appeal upon a contestation of the facts, but upon a denial of the right of pursuit according to international law, and claimed that "even if the doctrines of international law are to be applied, then they must be expressed in some proclamation or statute of the nature desiring to give effect to them."

Without assenting to this proposition as being one of universal application, I assume that for the purposes of this case the judgment must be rested upon the statute.

Whether or not this was present to the mind of the learned judge does not appear.

The general though not universal principle, that municipal legislation is necessary to give effect to the doctrines of international law, may have been assumed by him, and I think probably was assumed. These principles would not in themselves be effective or become operative in cases of this kind without municipal legislation. Paradoxical as it may seem, the recognition of a right that international law gives should precede the municipal legislation. No prudent sovereign power would willingly, in these modern times, invite conflict with a neighbor by enacting a statute directing that to be done which international law had clearly forbidden or that which had been denied as an inherent right.

This statute now in question must be read in light of the well-known, recognized, customary, or international law that has preceded it, and receive interpretation thereby.

The meaning of this statute when so read seems to be beyond all doubt.

The right of search is firstly given, in the case of vessels in Canadian waters.

Then section 3 describes what may be done, or so done as to cause a forfeiture of the vessel.

Then section 4 enacts that vessels so liable to forfeiture may be seized and secured by any officers mentioned in the second section.

The right to seize must have originated and the attempt to seize must have begun in Canadian waters.

There is nothing in the statute itself expressly limiting the attempt to seize or seizure to the Canadian waters. Where is the limitation to be found? Certainly not in the words of the statute.

In the absence of words of limitation, it might be urged that power was intended to be given to seize on the high seas wherever the offending vessel might be found, so long as no other state was invaded.

It would be unsafe to assume that any such intention existed in the mind of Parliament in using such comprehensive and unlimited language as used here.

Why so? Clearly, because by the customary law or international law or established usage — call it which you will — the right to rove anywhere and everywhere over the ocean and make seizures of vessels is not recognized by the general opinion of civilized men or by the sovereign powers of later times as a thing that should be done or permitted to be done in cases such as this.

The wide general nature of the words must, by observing these considerations, therefore be restricted within what all men having to do with such matters understand as reasonable.

This understanding we find in the expositions of text writers and the judgments of the courts, and the treaties of the nations. We must assume it was present to the legislators using this wide language and intended by them to lend it a reasonable meaning.

It seemed to be conceded by counsel that such was the almost universal modern understanding derived from such sources, that what is known as the three-mile limit might be considered as within these words relative to seizure if they meant anything; but not beyond.

I am unable to comprehend why we should adopt the one part of this recognized customary or international law, and discard all else.

The sole question raised here seems to be whether or not the authority given by section 4 does not imply that the seizure may be made where and under such circumstances as international law would permit.

I think clearly that this is the meaning of the statute. It gives the widest authority that international law, or in other words established usage, would justify.

It is just as if a statute authorized in like words a sheriff to seize goods or person. That would be read as meaning, though not expressly saying so, within his country.

The case of McLeod v. A. G. N. S. W. (1891), A. C., 455, I think well illustrates what I am trying to explain as my views of this statute.

The interpretation of the act in question there, in which the words used were capable of an unlimited sense, was held to be that it must be read as meaning and only in force so far as the Legislature of New South Wales had power to legislate.

The authority to seize here is to be restricted as within the limits that international [law] recognizes a seizure can be made.

The seizure is not to be frustrated by the wrongdoer's attempt to escape. The right of pursuit is recognized by international law. It springs from the necessity of the case. It rests upon what in the last analysis is the basis of so much international law in many analagous cases; the necessities of self-defense and protection.

The growth of that body of customary law has, only in modern times, found recognition of hard and fast lines in some cases, and in its still growing condition must be tested by what as appealing to all men as reasonable, when the occasion arises for the protection of the coast line of the land, the three-mile strip recognized as quasi appurtenant thereto, and the fish therein and all else that demands the exercise of sovereign power, beyond the land to make that power efficient within it.

The counsel for appellant took three other points which may be looked upon as subsidiary and covered perhaps by what I have said, but summed up in the last one taken by him, which is thus stated: "Canada has no jurisdiction beyond her territorial boundaries; in this case the three-mile limit," and which I should perhaps briefly notice.

In so far as this objection rests upon the absence of special statutory enactment relative to that part of the ocean beyond the three-mile limit, it is answered by the interpretation already given the statute. If, however, the objection is intended to distinguish between the authority that may exist in the Imperial Parliament and that more limited authority that the Canadian Parliament as a mere colonial legislature may possess, different consideration may arise. In this way of putting the objection, it seems to be covered by section 91, section 12 of the B. N. A. Act and the case of "The Fisheries Acts" (1898) A. C., 700. This section 91 was intended to, and does I think, confer upon Canada as full power in every respect in relation to the seacoast and inland fisheries of Canada as was possessed by the Imperial Parliament itself. It seems to be beyond doubt that such delegated authority would carry with it the right to pass such an act as that now in question. The act was upheld in the case just referred to.

The right to legislate in respect of the right of pursuit, so far as it existed, in relation to the necessity for protecting the seacoast and fisheries thereon, would be thus impliedly if not explicitly conferred.

The right of pursuit is expressly recognized by such eminent authority as the late Mr. Hall and others. The exact points involved in the case now in hand have not been passed upon by any of the decisions cited to us or any that I can find. But clearly the principles underlying the decision in the case of Hudson v. Guestier, 6 Cranch, 281, support a seizure on the high seas, even for breach of a municipal regulation, though the seizure took place beyond the three-mile limit and even beyond the two leagues that the regulation there in question specified for a seizure to be made. If taken as authority for us here it would support: Firstly the case of the forfeiture by reason of a breach of our municipal law; and, secondly, the adjudication by reason of the vessel having been brought when seized within the jurisdiction of the court which had to adjudicate upon the offense, and determine whether forfeiture had taken place or not.

The decision in the case of Church v. Hubbard, 2 Cranch, 187, did not turn upon the principles asserted by Chief Justice Marshall as quoted by the learned trial judge in his judgment. The case turned upon the reception of what was held to have been inadmissible evidence and for that reason a new trial was granted.

But clearly the principles enunciated by Chief Justice Marshall and the holding in Hudson v. Guestier, if correct, show that the fundamental right existed to so legislate that a foreign vessel might become forfeited for nonobservance of a municipal regulation and be seized beyond the three-mile zone. This right has been repeatedly asserted by legislation relative to branches of shipping laws, neutrality laws, and customs or revenue laws, as well as the case of fisheries. In each case the reasonable necessity seems to have been the basis for such legislation and the reason for its recognition in international law.

I think the appeal should be dismissed with costs.

*Dissenting opinion*

GIRONARD, J.:

I have had the advantage of carefully perusing the opinion of my brother Davies, and were it not for our own statute in the matter, the act respecting fishing by foreign vessels, R. S. C. 94, I do not think I would have dissented. I can not agree with him that section 4 alone determines the jurisdiction of the court. I think sections 2, 3, and 4 must be considered together. True, section 4 refers to seizure, that is to say, I presume, the warrant of the Admiralty Court served on a vessel; if that section stood alone, the conclusions arrived at by the majority of the court would be undoubtedly correct.

Sections 2 and 3, although not referring to seizure, mention certain steps which are conditions precedent to the seizure and the jurisdiction of the court. Section 2 declares that an officer in charge of the Government cruiser "may go on board of any ship * * * within any harbour in Canada, or hovering in British waters within three marine miles of any coast," etc., and then section 3 adds that the said officer "may *bring* any ship * * * within any harbours in Canada or hovering within British waters within three marine miles of any of the coasts * * * into port," etc.

It seems evident to me that the Government officer can not go on board of any ship violating our fishery laws except within three marine miles of any coast, and that, likewise, he can not bring any such ship into port except within the three-mile limit. Of course I understand that if the officer boarding any such ship within the three-mile limit is taken outside of it by force of circumstances, in such a case he would probably have the right to pursue, but this is not the case before us. The seizure, properly so called, was made in port and is not generally executed otherwise, for it is done by showing a warrant out of the Admiralty Court and served on board the vessel in default after she had been brought into port.

But whether it be so or not, I look upon the boarding of a vessel and taking it into port within the three-mile limit as conditions precedent which must be complied with to give jurisdiction to the court, and make the seizure legal. I think the language of section 4 has made that proposition still more clear, and it declares that "all goods, ships * * * liable to forfeiture *under this act* may be seized," etc. This forfeiture can not take place except as provided for in sections 2 and 3, and without complying with the requirements of these sections, I say again that the court has no jurisdiction.

Much reliance has been placed on the decision of the Queen's Bench Division in the Queen v. Hughes, 4 Q. B. D., 814, and on a late decision of the Court of Appeal for Ontario, *re* Walton, 11 A. R., 94, but in both these cases the courts had not before them a statute like the act respecting fishing by foreign vessels, chapter 94, and which to my mind affects the very jurisdiction of the court. Had the jurisdiction of the court been involved in these cases, I am inclined to think that the conclusion would have been very different. Lopes, J., speaking with the majority, said:

> I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices.

Hawkins, J., quoting Erle, C. J., with approbation, said:

> In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offense within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons

having been previously issued, unless the statute creating the offense imposes the necessity of taking some such step.

As I have already remarked, our Canadian statute has imposed the necessity of boarding the fishing vessel and taking her into port within the three-mile limit before the seizure can be made, and for that reason, and only for that one, I believe the appeal ought to be allowed with costs, and the seizure quashed, except as to the two small boats actually caught within the three-mile limit.

# BOOK REVIEWS

*International Law and Diplomacy of the Spanish-American War.* By Elbert J. Benton, Ph. D. The Johns Hopkins Press: Baltimore.

This book contains the Albert Shaw Lectures on Diplomatic History delivered at Johns Hopkins University during 1907. It is a particularly full treatment of the subject and contains no evidence of preconceived ideas which the author is determined to prove. He confines himself principally to facts, leaving interpretation to his readers. There is a generous amount of reference, principally to original sources.

The work is divided into such broad heads as "American Neutrality," "Intervention," "Transition from Neutrality to Belligerency," "Relations of the Belligerents," "Belligerents and Neutrals," etc. The author states the principles of international law bearing upon each of these divisions and then shows the American and Spanish practice.

The first chapter gives a concise and indispensable résumé of American relations with Cuba during the nineteenth century — a relief from the usual wearisome introductory chapters.

In the discussion of fillibustering the author shows how far usage has been from conforming with the strict theory on the question and that America has given a particularly loose interpretation to these rules. Careful attention is given to the interpretation of the laws of neutrality during this period.

The chapter dealing with the causes leading to the abandonment of the nonintervention policy is carefully thought out and well presented. Spain is given full credit for the measures taken to avoid war and to pacify Cuba, and it is claimed that the reforms granted by the decrees of November 25, 1897, "were put forth as preliminary to fuller liberty to follow the successful operation of these." The author asserts that war might have been averted had it not been for several incidents, for none of which Spain was responsible, which were the direct causes of the war. Among these he enumerates the troubles in connection with the attempted establishment of autonomy in Cuba; the Dupuy de Lôme incident, which revealed the lack of confidence of each country in the sincerity of the other; the proposed Papal mediation, and finally the destruction of the *Maine*. A careful analysis is made of Spain's liability on account of the occurrence of this disaster within her jurisdiction —

condemning the American Government for refusing the Spanish proposal of a mixed commission of inquiry, and voicing a regret that the *Maine* affair was not settled apart from the Cuban question.

The author analyzes the reasons for the American intervention in Cuba as set forth in the President's message, and decides that it was not justifiable on any single one of the grounds advanced by the President. While the *raison d'être* of the rules in restraint of intervention is to minimize the occasions upon which a state may be interfered with in solving its domestic problems, it is recognized that there are some cases "above and beyond the domain of law" when intervention may be justified on moral if not on legal grounds. The author evidently does not consider this such a case. He sums up the question thus:

> If it can be established that the American Government exhausted every resource of diplomacy to avoid war, there is some technical ground upon which to rest intervention. Cuba presented in one century an exceptional case of misgovernment, of unfulfilled promises, of prolonged internecine war, of neutrals burdened by border warfare. But in the light of the resort to war in the face of the full concessions of Spain the technical basis becomes very weak indeed. In the opinion of nearly all writers on international law the particular form of intervention in 1898 was unfortunate, precipitate, and unjust to Spain. The same ends — peace in Cuba and justice to all people concerned — in themselves good, could have been achieved by peaceful means safer for the wider interests of humanity.

The author finds in the period of transition from peace to hostility the first opportunity of testing the application of the rules of war by two Powers that have been well outside the sphere of modern wars. The retroactive declaration of war made by the United States is discussed and condemned; the careful consideration of the necessity for a declaration of war has lost much of its practical value because of the convention recently concluded at The Hague. The auxiliary navy proposed by Spain and actually organized by the United States is approved on the ground that it forms an effective and legal mode of hostilities and that some such means of reserve force must remain essential until the capture of private property at sea is abolished.

Some space is given to the consideration of the captures made by American vessels during the war, and résumés of some of the more important cases are given. In one of these — the case of the *Benito Estenger* — the decision of the Supreme Court seems to be at variance with the joint resolution of Congress of April 26, 1898, which declares, in Article I, "That the people of the island of Cuba are and of right ought to be free and independent." In this case the Cuban defendant advanced in his defense a sympathy with the American cause, and the court turned to the status of the Cubans with the conclusion —

> That in war, the citizens or subjects of the belligerents are enemies to each other and that political status determines the question of enemy ownership.

While the Cuban Government had not been recognized, the freedom of the Cuban people had been proclaimed and it seems difficult to accept the decision of the Supreme Court as logical. The deduction of the author is that —

> Where a nation intervenes in an insurrection and allies itself with the insurgents, merchantmen belonging to the latter will be considered enemy property. Citizenship and not individual sentiments will be regarded as the test of non-enemy character.

There is a thorough consideration of the more important points of the different declarations of neutrality. The question of repairs seems to require more definition. The general time limit allowed for belligerent vessels in neutral ports was twenty-four hours, save in case of urgent need of repairs, when it might be prolonged. Serious repairs, especially of damages received in battle, really amount to an augmentation of warlike force, and logic would seem to demand that the neutral either compel the unseaworthy vessel to disarm and remain in port until the conclusion of hostilities or go out to sea and face the enemy. American practice in the Russo-Japanese war has strengthened this idea.

The negotiations, conclusion, and fulfillment of the treaty of peace are carefully presented, the author confining himself in the main to the bare facts, although he indulges in a discussion as to whether the Constitution follows the flag.

While the reader may differ with the author as to the inferences to be drawn from the facts presented, the work is an exceptionally thoughtful and instructive presentation of international practice during this period.

HUGH S. GIBSON.

*Manual of American History, Diplomacy and Government.* By Albert Bushnell Hart, Professor of American History in Harvard University. Cambridge: Harvard University Press. 1908. pp. xvi, 554.

Without attempting to treat the subject exhaustively, Professor Hart made a most valuable contribution to American bibliography, to which frequent discussion of methods in teaching and studying history and of the relative value of historical material have added a distinctly pedagogical character. The book is a continuation of a series of previous publications by the author under the titles of "Outlines," "Suggestions for Students," and "Revised suggestions," which have proved singularly helpful and stimulating to students and teachers of American history in all parts of the country; and embodies the best features of them all. It is an improvement upon the author's Handbook of American History, Diplomacy and Government issued in 1901, in that it reflects more fully Professor Hart's experience as a teacher of American history, and continues the work from the Civil War to the present time.

The present work contains an outline bibliography of six different courses of American history in the three divisions of purely narrative history, diplomacy, and government, based upon methods pursued in the Department of American History in Harvard University. As these courses are intended to be training courses rather than information courses, the references to sources and authorities have been arranged with respect to their bearing upon the subjects under investigation rather than to chronological sequence.

In addition to bibliographical and pedagogical features, there is a list of more than a thousand subjects for library reports, embracing the whole field of American politics adapted for assignment to classes and calculated to train the student in the work of historical investigation and research. There is also a list of American statesmen and politicians arranged according to States. In short, the volume abounds with suggestions which render the book invaluable to the beginner and of great service to the more mature student of American history. Professor Hart's reputation rests upon much more ambitious work; but it is doubtful whether anyone could have given to the public, and especially to the student and teacher of American history, a more useful book.

CHARLES C. SWISHER.

*International Law in South Africa.* By T. Baty. Published by Stevens & Haynes: London. 1900. pp. xii, 127.

This little book is one of the most interesting which has appeared. There is always something particularly vigorous about a book which is based upon a series of lectures, and in reading that "the following studies were originally delivered at Oxford," one is reminded of Sir Henry Maine's International Law, which had the same origin.

The first chapter, entitled "Contraband for Neutral Ports," is a masterful criticism of the doctrine of continuous voyages as applied to contraband. In the first place, the author takes pains to explain away much unfounded reasoning which has been based upon certain decisions erroneously classed as cases of contraband, when in reality the condemnation was due to the hostile character of the cargo or else to trading with the enemy.

This confusion results from our forgetting that before the Declaration of Paris, and in accordance with the time-honored rule of the Consolato del Mare, English prize courts confiscated enemies' goods carried in neutral ships. Hence, there could be no question of contraband except in the case of a neutral cargo. Oftentimes, however, the question of whether the destination of the cargo was not hostile was considered in the proof of ownership.

As for trade with the enemy, the author shows that in such cases the courts condemned the goods directed to a neutral port when convinced that the ultimate destination was to the enemy. But this was nothing except the enforcing of obedience to a municipal regulation on the part of citizens and has no connection with international law. In the case of the *Imina* (3 C. Robinson, 167), on the other hand, Sir William Scott refused to condemn a neutral cargo which he must have felt morally certain was intended for the enemy.

A luminous discussion of other cases is entered into. The decision of the *Springbok* is strongly condemned; and when we come to the diplomatic correspondence in reference to the seizure of the *Bundesrath*, the *Herzog*, and the *General*, neither Government is shown to have played a brilliant rôle. Incidentally, the embarrassing episode of the Manual of Naval Prize Law is touched upon. So closely knit is the argument against the seizure as contraband of goods bound for a neutral port that to summarize it would mean to repeat it. In passing, the abolition of contraband is advocated and the views of Lorimer and others taken up. In reading this chapter, one wonders if the date of publication can really be 1900, for it seems as though the writer must have been aware of certain events which have since taken place.

In discussing the "Status of the South African Republic," the difficult question of half-sovereignty is treated historically and from the point of view of modern authorities. In this connection, we find the characteristic sentences (page 47):

> It is a question indeed, as will be seen hereafter, whether the promise to have no foreign relations does not operate *ipso facto* as a renunciation of the capacity

to entertain them; but this accident does not affect the principle. The difference is that which exists between contract and conveyance — between the creation of a right *in personam* and a right *in rem* — between a continuous and a transitory convention. In the former case, the transaction leaves the sovereign subsisting as before, only bound to carry out a particular provision; in the other, it operates at once, and exhausts its effect in transmuting the sovereign into a *mi-souverain* state. This difference is to some extent expressed, though not clearly, in the word "unequally."

The essential point of the discussion of the passage of troops over neutral territory is found in the following passage (page 74):

> A test is undoubtedly wanted, by which we may be able to separate real servitudes from personal engagements. At Rome the want of such a test brought it about that personal stipulations created real servitudes, in the later history of the law.
>
> It is submitted that for international purposes the true test is: "Could the power claiming the right of way, or other servitude, enforce its claims during peace time by force, without infringing the sovereignty of the territorial power?" And it will follow that if it could, and the servitude is consequently a real right, it will still have the right to use its road in time of war, and that the owner of the territory will be bound to permit the use, without giving cause of offense to the enemy who is prejudiced by the existence of the servitude.

The chapter on the "Conduct of Warfare" discusses the rules of war and in how far they are possible of observance in actual warfare. It is truly said (page 89):

> The greater danger of proceeding too fast in measures of reform with regard to what is permissible in warfare is this: If we lay down rules which are very much in advance of the ideas of military personages, the result will be that they will be simply disregarded. And thereupon, when the subordinate officer and the rank-and-file see this constant infringement of what are styled laws of war, they will infer that all laws of war — even the old well-established ones — are made to be broken, and war will tend to become lawless. Unless we are careful to introduce reforms gradually, and as the state of opinion in the army is able to bear them, we run the risk of obtaining a beautiful moral code of war to which nobody pays the least attention, except in official documents; practice would be thrown back to the unregulated savagery of the time of Grotius.

The warning is timely, but, on the other hand, the official promulgation of rules which were in advance of the time has often raised the standard to their level. It is, as in all things, a question of degree. Rules should be in advance, but only so much in advance that they will be observed by the forces of the most advanced nations. When the practice of the laggards draws near that required by the rules, it is time for another step forward.

The last six pages of the book are devoted to an examination of a question which is as complicated as it is important, *i. e.*, the status of corporations or companies in war. In reading this chapter, the important article 23, *h*, of the convention regarding the laws and customs of land warfare, adopted at The Hague last summer, must now be taken into consideration:

ARTICLE 23.

Besides the prohibitions established by special conventions, it is particularly forbidden:

* * * * * * *

(*h*) To declare extinguished, suspended, or barred the rights and choses in action of the nationals of the adversary.

* * * * * * *

ELLERY C. STOWELL.

*Anglo-Chinese Commerce and Diplomacy.* By A. J. Sargent. Oxford: Clarendon Press. 1907. pp. 316.

In his preface the author remarks that this work is an attempt to view the British and Chinese relations solely in their bearing on the interest of commerce, and that the details of political changes and military occupations are not included. This preface must be continually borne in mind in reading the book. His method of dealing with China and her relations with the foreign powers, keeping the commercial relations always to the fore, is perhaps a little unusual to the student of Chinese history, who ordinarily attempts to grasp the situation in the Far East first through the history of the political relations, from which the vicissitudes of trade follow in a secondary manner. Because the growth and decline of the various trades are dealt with in successive periods, it is difficult to review this volume by taking each trade by itself. It has been found more convenient to follow the author's theory and to treat each chapter separately, emphasizing only the main features contained therein.

Chapter one, entitled "The Rule of the Company," opens with a letter of Queen Elizabeth to the Emperor of China craving that her subjects "may have full and free liberty of egress and regress, and of dealing in trade of merchandise with your subjects."

The author dwells on the Lord Macartney embassy to China in 1793, undertaken in behalf of the East India Company, and shows the difficulties which immediately arose as to the performance of the "kotow," the prostration before the Imperial Throne, and the steady refusal of Macartney to conform thereto. Following this embassy came that of the Dutch Company, which willingly performed the "kotow," but apparently lost prestige in the eyes of the Chinese because of its too willing submission to all the demands imposed.

A very interesting discussion of the "hongs," or bodies of merchants numbering from two to twelve, follows. These "hongs" constituted the intermediary in all things between the Chinese officials and the foreigners. They were, in fact, responsible to the Government for the good behavior of foreigners, and no foreign ship was allowed to trade until a member of a "hong" had become security for the good behavior of the crew. Their functions, therefore, were both diplomatic and political, as well as commercial.

The author describes the great power of the East India Company and states that at the beginning of the nineteenth century the Americans alone could claim to be considered its rivals.

There is an interesting picture of the embassy of Lord Amherst in 1816, in which the final attempt of the company to improve its relations within China was made. Amherst failed, too, in his reception by the Emperor because of the informality of the imperial invitation. The author shows that the whole of the trade of the United Kingdom was nominally in the hands of the company until 1834, British subjects and vessels outside those of the company being forbidden to deal in tea, the principal export from China, in any way whatever.

Chapter two is entitled "The Course of Trade to 1834." It appears that at the beginning of the eighteenth century China as a market for British manufactures can hardly be said to have existed. At the beginning of the nineteenth century, however, China was the equal of India for British products. The principal interest of the period between 1793 and 1834 lay in the progress of the exportation of manufactured goods to China. The chief imports of the company into Great Britain from China consisted of tea and a comparatively small quantity of raw silk, and during the last years of its charter the company dealt solely in tea. The importation of tea into Great Britain shows a continuous and steady increase from the beginning. Down to the middle of the eighteenth century the opium trade hardly existed; what there was being mostly in the hands of the Portuguese at Macao.

Chapter three, "From the Opening of Trade to the Treaty of Nanking," begins with the act of Parliament which abolished the commercial monopoly of the company and placed three superintendents to represent British authority in China. Then follows an account of Lord Napier's visit to Canton and of his dealings with the local authorities at that port. It shows clearly that Lord Napier understood little about the Chinese character and was totally lacking in patience and courtesy. In 1836 the commission was reduced by the British Government to one superintendent, Captain Elliott. In March, 1837, Captain Elliott succeeded in bringing forth an imperial edict giving him the right of direct communication with officials. There follows an interesting account of the struggle of the Chinese to suppress the opium importation, which began by imperial edict in 1834. There were at that time two distinct parties among the Chinese officials, who differed as to the remedies needed. The first party believed that the best means to prevent the importation was to sanction the cultivation and the preparation of the drug in China. The second party was strongly anti-foreign, and held that the object of the English in bringing opium into China was to weaken the Chinese. The latter party preferred the total prohibition of the use of opium, and prevailed.

The remainder of the chapter is devoted to an account of the Opium War and of the relations of the foreigners with the Imperial Commissioner Lin, who was sent from Peking for the express purpose of entirely eradicating the opium traffic. The author does not touch the actual conduct of the military operations, but brings out the fact that no amount of pressure on the provincial authorities could produce an effect at Peking. The difficulties culminated in the Treaty of Nanking, August 29, 1842, when a number of ports were opened to foreign trade and the Chinese were forced to abandon their policy of exclusion toward other civilized nations.

Chapter four is entitled "From the Treaty of Nanking to the Treaty of Tientsin." The former treaty, though putting an end to the so-called Opium War, makes no mention of opium. The British Government still wished that some arrangement could be made for the admission of opium into China, but were not willing to make the matter a demand. It may be noted that Sir Henry Pottinger advised the British Government to refrain from attempting to legislate on the matter, stating that nothing but an international agreement on the part of all the foreign governments could put an end to the traffic. This is particularly interesting in view of the attitude at present adopted by the United States Government in enlisting the sympathies of the various foreign powers having possessions in the Far East to suppress the opium traffic in their Eastern possessions.

The British Government at this time stated that it did not desire to obtain any exclusive advantages for British trade in China, but was only desirous to share with all other nations any benefits which they may acquire. An excellent résumé which gives due importance to the most essential articles in the Treaty of Tientsin, signed on June 26, 1858, follows. China here concedes to foreigners the privilege of the residence of their ambassadors in Peking; provision is also made for the appointment of consular officers; there is also discussed the principle of extraterritoriality, which is fully recognized.

In chapter five, "The Growth of Trade from 1834 to 1864," the author in tabular form shows the growth of cotton, woolens, tea, piece goods, opium, etc., during this period. He states that China, in spite of her size and population, did not take one-half as much of British goods as Holland, Australia, or the North American colonies; explaining this fact as due to China's vast domestic industry. The British imports, being almost exclusively textiles, had to compete with and displace home products. It appears that the Americans were particularly active during this period with steamers adapted to the river traffic, while the Germans were patronized by the Chinese because of the convenience and economy of their small vessels in their coast trade.

Chapter six, "The Interpretation of the Treaty of Tientsin and the Convention of 1869," is of interest as showing the commercial effects of the reforms inaugurated under the treaty. The aim of Great Britain was to strengthen the Chinese executive and to urge it to assert its authority over the local officials. The author touches upon the opening of the Yangtze River to foreign trade, which resulted in great difficulty with the Taiping rebels. He speaks about the establishment of the foreign inspectorate of customs, which sprang out of a local but temporary arrangement of the customs in 1854 while the Taipings occupied Shanghai. The employment of foreign servants by China was a distinct success from the point of view of finance, but encountered great opposition both from Chinese officials and foreign merchants.

The author then discusses the "likin" tax, which was first imposed during the Taiping Rebellion, showing that to free foreign goods from all taxation, which was so much desired by the foreigners, would have been to grant them a preference over the native producer or trader, who was forced by local custom to pay his "likin" tax. He brings out clearly the difference in point of view, which still exists, between the foreign governments and their nationals in China — the former endeavoring to construe treaties with a view to international law and justness; the mercantile idea being to read their own desires into the texts.

Chapter seven is entitled "From the Messacre at Tientsin to the Chifu Convention," 1870–1876. The author identifies the massacre at Tientsin closely with the relations of the missionaries to the Chinese. At various times through this volume the author produces the impression that the chief difficulties of the diplomats in carrying on their work for the development and improvement of commercial relations were caused by a long series of troubles between the missionaries and local officials. He fails to realize that in many cases the missionaries, by their very presence in the interior of the Empire, have been the agents of trade and of Western civilization, and to them more than to the merchants themselves is due the interest of the Chinese in the Western civilizations. He takes the point of view rather of the resident of a treaty port who sees everything in the actual supply and demand of goods, and attaches little importance to the relations of the consumer to the producer. This chapter closes with a discussion of a memorandum of the inspector-general of maritime customs in 1876, summarizing the defects of the commercial relations between China and the powers and showing the desires of the foreigners and the suspicions of the Chinese.

There is a discussion also of the question as to the moment in which foreign goods which have reached their destination become Chinese goods and as such are liable to any taxation which China pleases to impose — a question at issue now with the Chinese Government.

Chapter eight, "The Course of Trade from 1865 to 1884." The earlier years of this period show satisfactory progress in all departments of trade in spite of the commercial crises in Western countries, the purchasing power of China growing, apparently, because of the opening of new markets under the treaties. However, it became more and more difficult to regulate the supply in accordance with the demand, and in 1871 and 1872 the local markets were glutted with unsalable goods. It is worthy of note that this condition of things has been repeated since the Russo-Japanese war, and at the present moment the export trade of the United States to China is suffering from the overstocking of Chinese markets in 1904 and 1905.

In 1872 there appears the first real attempt of the native to wrest the local steam traffic of China from the grasp of the foreigner, which was the establishment of the China Merchants Steam Navigation Company, a company supported by powerful officials and which debarred foreign shareholders.

Chapter nine is entitled " The Development of the Policy of ' Spheres of Influence.' "

In this chapter the author traces the history of the policy of " spheres of influence." In so doing, however, he has not brought out as strongly as might have been the result of such policy by reason of the attitude of the United States. The author confines to a note the important and far-reaching activities of the United States in her declaration of this time of the principle of the " open door," which has been adopted by the various powers and therefore has reduced to a minimum the importance of the policy of " spheres of influence." The loan of 1897, guaranteed by the British Government, to enable China to liquidate the Japanese war indemnity, and in which the important assurances are given that the inspector-general of customs shall be an Englishman so long as England shall maintain her preponderance of trade, is then touched upon. The author observes that the tender of the new mining and railway regulations illustrates the real motives of the Chinese policy, which is that the control of mining and railway interests must rest entirely with Chinese merchants so as to preserve sovereign rights.

In chapter ten, " The Course of Trade from 1885 to 1894," the author admits the difficulty of obtaining a clear conception of the development of China's commerce during the last twenty years, but gives a number of tables of average value of the net imports of foreign goods and the exports of Chinese products during these years.

In 1884 a matter of interest appeared — the competition between England and America for the field in the heavier piece goods. America held the field, but in the cheaper and lighter type of goods England controlled the market. In 1894 the Japanese piece goods, as well as yarns, began to appear on the market. The author touches upon the introduction of kerosene oil, in which, for a long time, America enjoyed a monopoly, but which Russia began to import into China in 1891. It is significant that the growing import trade of miscellaneous articles became the special sphere of the Germans. The author dwells upon the vicissitudes of tea as offering a fascinating study in the romance of commerce, and compares it with that of silk, which provides no very revolutionary changes for discussion. He concludes that the general atmosphere of China seems particularly conducive to the growth of the spirit of monopoly.

Chapter eleven is entitled "The Renewal of the Anti-Foreign Movement and the Recent Economic Changes." Again the author condemns the missionaries for their claim to absolute freedom of movement and settlement, freedom which is denied to British subjects in general, and reiterates that the British commercial interests in China have been jeopardized by the "peculiar" ideas of the missionary bodies.

The author analyzes the British treaty of 1902, which was drawn up in compliance with the protocol of 1900, and very properly emphasizes the eighth article in reference to the abolition of "likin" taxation, and also the twelfth article, in which Great Britain admits that she will be prepared to relinquish extraterritorial rights when she is satisfied that the state of China's laws will so permit. This is the first time in history that a European power holds out the prospect of the ultimate recognition of the complete sovereignty of China. He admits the difficulties in the way of the Chinese carrying out fully the provisions of the treaty because of their ancient methods of life and administration.

In conclusion he dwells upon the value of China's markets for cottons, which in 1904 comprised more than one-third of the total imports; shows how opium is declining; states that there seems to be little prospect that tea will recover its former position, and that the exportation of silk reached its high-water mark in 1899 but has since collapsed; and emphasizes that in the future the real resources of the Chinese Empire are to be found in her great undeveloped deposits of minerals.

The volume, as a whole, is of interest, especially in respect to the author's analyses of the various British-Chinese treaties and agreements, which are ably summarized.

The chief difficulty in following the author in his history of the rise or decline of especial trades lies in the fact that he has distributed such discussions over arbitrary and perhaps illogical periods of time, handling within certain dates the fortunes of various trades, rather than furnishing a complete and separate history of each trade by itself.

William Phillips.

*Die Attentatsklausel im deutschen Auslieferungsrecht.* By Dr. Wolfgang Mettgenberg. J. C. B. Mohr: Tübingen. 1906. pp. 114, xii.

The subject discussed by this monograph is a clause, frequently to be found in extradition treaties ratified since 1858, to the effect that an attempt against the life of the head of a government or against that of any member of his family, when such attempt "comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offense or an act connected with such an offense."

The author has given us a clear view of the acceptance of this principle so far as Germany is concerned and traces its historical origin from the case of the two Jacquins, who were charged with an attempt upon the life of the Emperor Napoleon III on Belgian territory in 1854 and whose extradition at the request of France failed because of the rule of political offenses. Two years later an amendment to Belgian criminal law specifically excluded an attack upon the head of a government from the category of "délits politiques" and in the form already quoted found adoption in many European treaties. The United States has also ratified treaties containing this clause, practically in its original Belgian form, with a number of European nations (Moore's Dig. of Inter. Law, IV, 352). As the present author points out (page 44), the terminology is taken from the Belgian penal code and is inappropriate to definitions of German penal law, as obviously it is also to that of the United States.

The historical part of the work reviews all the treaties containing the clause, to which the German Empire or its constituent states have been parties (pages 13–54). From this it appears that the only substantial departure from the typical cast of the clause is found in the exchange of notes in 1885 on the part of Prussia and Bavaria with Russia, in which it is specifically provided that the fact that a crime has been committed for political motives shall not be a cause for refusing extradition (page 54).

The *attentat* clause may be taken as a distinct exception to the rule that no extradition lies for political offenses. It has, in fact, been denominated an *exceptio exceptionis* (page 86). It follows that if the offense be not political, even though directed against a political personage, the accused may nevertheless be extradited, even in the absence of the clause. There is therefore a reversion to that most difficult of all questions in the law of extradition, "What constitutes a political offense?" The author accepts the difficulty of the problem and says (page 61) that although the concept has been known to international law for more than a century, no universally accepted standard has yet been evolved. As evidence of this, his further discussion develops five separate view-points into which the opinions of jurists and governmental experts may be classed. The preponderating opinion is considered to be that which makes the object of the attack authoritative, irrespective of the motive or intent of the offender (page 64). Furthermore, as the treaties do not define the term, reference must be had to the national law of the contracting parties, and here the author maintains (page 70) that the standard of international law requires the concurrence of the penal law of both nations to the effect that the offense is political.

The importance of the subject has been greatly enhanced through the spread of anarchistic crimes. The author discusses the theory maintained by some authorities that crimes of this class are antisocial and not political and should be extraditable because directed against *all* government. This is the French view, and British authority also seems to favor it (see, *e. g., In re* Meunier, 1894, 2 Q. B. D., 415). The author (page 113) fears that it would lead to too great a limitation upon the right of asylum. He agrees with de Hart that the *attentat* clause should be employed to settle the doubt. We can not follow him, however, in his dissent (page 90) from Lawrence and the preponderance of authority, that the shooting of a sovereign in open warfare in the course of an insurrection should be deemed a political offense. Whether such an act is contemplated by the *attentat* clause is quite another matter. The author favors the affirmative view, but there is a difference of opinion even as to this (*e. g.,* Beauchet).

The book is logical and analytic in style and throws much needed light upon a difficult subject. As in many German books, the bibliography is extensive, though somewhat deficient in respect of the Anglo-American authorities.

Arthur K. Kuhn.

*Studies in International Law.* By Coleman Phillipson, M. A. London: Stevens & Haynes. 1908. pp. 127.

The author of these capital studies states that "the following essays, dealing with important questions of international law, were written at the suggestion of Sir John Macdonell," and it is appropriate that the work due to the suggestion of Sir John should be dedicated to him.

The contents of Mr. Phillipson's book may be divided into two parts:

First, the influence of international arbitration on the development of international law (pages 5–49); the Second Hague Conference and international arbitration (pages 118–127); second, the rights of neutrals and belligerents as to submarine cables, wireless telegraphy, and intercepting information in time of war (pages 55–117). Of each in turn.

Mr. Phillipson gives a short survey of various arbitration schemes (pages 5–15), and shows clearly the distinction between the award of an arbitrator and the judgment of a court by a single quotation from Aristotle, who said: "The arbitrator looks to what is fair; the judge to what is law." The distinction still exists, and in order to satisfy the international conscience and to commend international courts of justice to the world at large, we must substitute for courts of arbitration, in which "fairness" is the rule, courts of justice, in which the law is administered. Mr. Phillipson follows up the introductory section on arbitration schemes by a section devoted to the modern conception of arbitral procedure and its relation to the conception of law, and in a third section, headed "The Chief Arbitrations of the Nineteenth Century and their Influence on International Law," shows what a potent factor arbitration has been in the recent past, and what the prospects of arbitration are in the future. His conclusion is so admirable that it is quoted at length:

> The future development of arbitration depends on the recognition by each state that its desires and claims are not necessarily just ones; that even to suffer some possible disadvantage, real or imaginary, as a result of an arbitral award, is not so disastrous as having recourse to an all-destructive war; that international affairs will best prosper when clear rules and principles are amicably laid down and universally accepted as law, and not treated as merely elastic maxims of subtle diplomacy, and when these principles are applied in an impartial manner by a tribunal acting in a judicial spirit, and its decisions, if properly arrived at, accepted loyally. And so the gradual but sure growth of a body of principles, calculated to adjust and regulate the relationships between states, points to the time when the employment of violent methods to exact justice will give way to the universal sovereignty of law, as Mirabeau says: "Le Droit sera un jour le Souverain du Monde" (page 49).

The actual work accomplished by the Second Hague Conference is partially but sympathetically treated. For example, he quotes the Marquis of Ripon as saying that he "believed that it [the last conference] had laid the foundation upon which an advance could be made in the interests of peace on a similar occasion in the future" (page 121). Then he quotes the utterance of a recent premier, Mr. A. J.

Balfour, in the House of Commons: "I attached great importance to what was done in past times at The Hague. I am an optimist in regard to international relations in the future. I believe the great work * * * of international arbitration has already prevented, and will in the future prevent, more and more wars which do not spring out of intolerable wrong or causes which a nation feels can not be dealt with by any third party or any arbitrator, however well intended" (page 121). And he furthermore singles out the commendation of the present premier, Mr. Asquith: "Although the results may not equal the anticipations the more sanguine amongst us formed, yet, even when you come to judge the conference by solid results, serious and substantial advance has been made in the direction which we all hope the world will gradually take" (page 122).

The author finds a great progress registered in article 53 of the revised convention for the peaceful settlement of international disputes, giving the Permanent Court power to formulate the *compromis* upon the request of one of the parties litigant. In the next place he considers the convention for the limitation of force in connection with the collection of contract debts to mark an advance, and he has a good word to say for the attempt to constitute a court of arbitral justice. After quoting the first paragraph of the project, he says:

> Here can be seen a clearly expressed desire for the growth of international law by means of a gradual formulation by a court possessing judicial capacity of principles and cases which would serve as precedents for guiding subsequent decisions on the one hand and regulating international relationships on the other. However, the proposal for the establishment of such a court failed in consequence of the determined opposition offered by a small minority. The minor states demanded nothing less than equal representation, to which principle the greater powers refused to risk their interests (page 127).

The balance of the book, dealing with the rights of neutrals and belligerents as to submarine cables, wireless telegraphy, and intercepting of information in time of war, is a careful, historical, and accurate account of the law on this subject, as worked out before the Second Hague Conference. The reasonableness and correctness of the author's thesis is evidenced, as he himself says, by the fact that the recent conference adopted conclusions substantially the same as his. Greater commendation can not well be asked nor received.

The book as a whole is a contribution to the subjects of which it treats and it is commended unreservedly to the public.

JAMES BROWN SCOTT.

*World Organization.* By Raymond L. Bridgman. Boston: Ginn & Co. 1905. pp. 172.

*The Federation of the World.* By Benjamin F. Trueblood, LL. D. Boston: Houghton, Mifflin & Company. 1907. Third edition. pp. 228.

These two little books, singularly unlike in their point of approach and treatment of the subject, reach the identical conclusion, namely, that the federation of the world is possible. Mr. Bridgman shows that unconsciously and step by step we have a world organization, rudimentary but capable of infinite development. Dr. Trueblood analyzes the various elements, and shows how the principles of the gospel have led and are leading to a universal brotherhood, which, unless checked, must inevitably lead to a federation of the world. The one lays before us the process and the steps in the process by which the desired end is being reached; the other analyzes the motives of men in society, which sooner or later will lead to international organization. The one is descriptive; the other is analytical.

Mr. Bridgeman's admirable little book consists of 158 pages of text, with some fourteen pages of appendix, and within this narrow compass he discusses world unity and finds the existing unity of mankind the condition from which the organization of the world as a single political body is sure to be developed. In chapter 2 he urges that no national sovereign is absolute, but that only the sovereign of mankind is absolute. He points out the real world constitution in the rights and relations of individuals and of nations, and calls attention to a world bill of rights and a world form of government which the nations are now formulating, though both still are uncertain. In chapter 4 on the world legislature he shows why the establishment of a permanent world legislature in the near future seems necessary and probable for the transaction of the business of the world. Chapter 5 deals with the world judiciary, and the enlightened author holds that the Hague Court of Arbitration is likely to be the foundation of a world judiciary. Chapter 6 on the world executive forecasts, according to the author, the development of a world executive department and shows how germs of it have already begun to grow. Chapter 7 on world legislation already accomplished is exceedingly persuasive and cites numerous instances of world legislation now in practical effect, while a world constitution and a world executive seem dreams of the future. In chapter 8, entitled "World business now pending," the author mentions important measures of world business already pressing for attention by a world legislature, and in it outlines many topics which will undoubtedly find a place in future programs of the Hague conferences. We can not disguise from ourselves the fact that the periodical meetings of the conference strongly resemble a world legislature and the establishment of a permanent court of arbitration or justice at The Hague would go far to supply the world judiciary which the author earnestly desires and predicts.

Chapters 9, 10, 11, and 12 deal with national constitutions, showing that there are no obstacles to the organization of the world; the supremacy of races, showing that world organization, with permanent national boundaries and secure peace, will not interfere with the virility and expansion of races nor check beneficent forces; the mind of the world, giving an idea of the world enthusiasm and the world impetus which would follow world organization; and forces active for world unity, with an enumeration of some of them.

The book ends with chapters 13 and 14, in which it is stated that world organization secures world peace, and in the concluding chapter states the advantages which a permanent peace would secure to the world.

The reviewer has deemed it best to set forth the contents of this admirable little book in some detail without criticism, for there is not a single topic treated which might not well form the basis of serious examination. His purpose is rather to commend the book to the public in order that the careful reader may himself weigh the arguments for and against the system advocated. While the reader may not accept Mr. Bridgman's views in all respects, and may be inclined to regard the author as a visionary, the reviewer believes it to be an indisputable fact that Mr. Bridgman has stated accurately present tendencies, although the conclusions drawn from them may be neither so obvious nor so immediate as the author contends. The book, however, stimulates thought, and deserves careful consideration.

Dr. Trueblood's little book, for it is only 228 pages, including an appendix and selected bibliography, modest as it is, may well claim to be the handbook of those who believe in the possibility of the federation of the world. It is a third edition of lectures delivered in 1897 at the Meadville Theological School and published in the form of ten small chapters in 1899. The benevolent author is the well-known secretary of the American Peace Society, and is a member of the Society of Friends, whose watchword is inner and outer peace. In the preface to the third edition he says that he has not "deemed it wise to make any material changes in what was then written. The nature of the argument, as an interpretation of the forces and movements then clearly seeming to me to be rapidly working out the federation and peace of the world, is such that it could not well be made more forcible by recasting it into another form."

In leaving the text untouched he was well advised, for it is impossible to present more clearly or forcibly the arguments making for peace, and the events of the eight years succeeding the publication of the first edition justify in large measure the prediction then made by Dr. Trueblood. The eleventh and twelfth chapters, dealing respectively with the "First Hague Peace Conference" and the "Hague Court and Recent Progress toward World Unity," are published for the first time, and outline admirably the progress toward federation from the publication of the little book to the present time.

In commending this admirably written book to the public the reviewer refrains from criticism as in the case of Dr. Bridgman's book, but he would disassociate himself from the praise lavished in the footnote on page 77 on one Van der Ver, of Holland, whose heroic refusal to do military service is especially commended. Wars may be morally wrong, and military service may be an unjust burden both upon persons and property, but the laws of the land, while they may be opposed, are nevertheless to be obeyed. Otherwise the still small voice of conscience repeals the statute, and we substitute individual conception for national legislation, a result differing little from anarchy.

On page 212 credit is given to the United States delegation for the provision in the revised convention of 1907 for the pacific settlement of international disputes, that "one of two disputing states may apply directly to the Bureau of The Hague and ask for arbitration." The honor belongs to the Peruvian delegation, which introduced the amendment, although it is true that the American delegation supported it loyally and was largely instrumental in securing its adoption.

But these are, after all, slight blemishes in a work characterized by accuracy and inspired by a desire for universal peace based upon a recognition and application of the elementary principles of justice.

The bibliography appended to the work is likely to be of great service to those who take an interest in the peace movement and who wish to familiarize themselves with its literature.

James Brown Scott.

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# OBLIGATORY ARBITRATION AND THE HAGUE CONFERENCES

The kinds or degrees of obligatory arbitration advocated in the two conferences were three in number, and may be called, respectively, *universal, inclusive,* and *exclusive* obligatory arbitration.

Universal obligatory arbitration, or obligatory arbitration for *all* classes and cases of international differences, without any exception or restriction, was not only considered by the First Conference as entirely impossible under existing conditions, but was not even made the subject of a single delegation's "proposition."

In the Second Conference it was proposed by the delegation from the Dominican Republic, and Denmark "called the attention" of the conference to its three treaties (with the Netherlands, Italy, and Portugal) which provide for obligatory arbitration without restriction. The Dominican delegation based its proposition on the desire for arbitration so emphatically expressed by the representatives of nineteen American powers in the Conference of Rio de Janeiro. But the committee of examination, to which all the arbitration propositions were referred, decided unanimously that it was useless even to discuss this proposition, as it was certain to be rejected by the conference. This decision was generally acquiesced in, and no further serious reference to this kind or degree of arbitration was made during the conference.

Inclusive obligatory arbitration, or obligatory arbitration for certain specified classes of international differences, was proposed to the First Conference by the delegation from Russia, and to the Second Conference by the delegations from Portugal, Great Britain, Sweden, and Servia. In both conferences it was made the subject of long and earnest debate. The arguments advanced in its favor were that it would assert the principle of law in international relations and guarantee it against infractions and attacks; that it would neutralize vast domains of international relations by the elimination of numerous and troublesome differences, which, though not often themselves a cause for war, are nevertheless embarrassing to diplomatic relations and create an atmosphere of distrust and hostility between nations in which a war may be readily enkindled by some chance spark; that it would enable states more readily to enforce their legitimate claims, and, what is more important, to free themselves from unjustifiable demands.

These familiar arguments met with their familiar acceptance, and no arguments whatever were advanced against this kind of obligatory arbitration *per se*. The bone of contention in both conferences was as to what classes of differences should be specified.

The Russian proposition to the First Conference included twelve classes, as follows: Disputes or claims relating to pecuniary damages incurred by a state or its citizens as a result of a wrongful action or negligence of another state or its citizens; disputes relating to the interpretation or application of treaties in regard to postal and telegraph systems, railways, the protection of submarine cables, means of preventing collisions of ships on the high seas, the navigation of international rivers and interoceanic canals, the protection of literary and artistic copyrights and of commercial patents, trade-marks, and titles, monetary and metrical systems, sanitary and veterinary rules and regulations against epizoöty, phylloxera and other scourges of agriculture, the regulation of inheritance, extradition, and mutual judicial assistance, and boundaries (in so far as these last relate to purely technical and nonpolitical questions).

To the above list of treaties, the committee of examination added, on motion of Count Nigra, of Italy, those relating to the free reciprocal aid of the sick and indigent. But it rejected a Belgian proposal to add commercial and consular treaties, and a Netherlands proposal to add treaties relating to the aid of sick and wounded soldiers in time of war; and on motion of the United States delegation it struck from the Russian list treaties relating to the navigation of international rivers and interoceanic canals and those relating to monetary systems.

The Belgian proposal was rejected on the argument of Professors de Martens, of Russia, and Zorn, of Germany, that an obligatory arbitration clause could easily be inserted in commercial and consular treaties — a measure, said Count Nigra, of Italy, which the Italian Government "has already decided to adopt." The Netherlands proposal was rejected on the argument of Professor Zorn that it would result in insurmountable difficulties by subjecting military operations to obligatory arbitration. And the exclusion of the navigation and monetary treaties was due to the argument of Mr. Holls, of the United States, that the navigation of such rivers as the St. Lawrence, Rio Grande, or Columbia, and the control of the Isthmian Canal, would be regarded as preëminently American questions by the United States Government, which would not consent to their arbitration by a court composed mostly of Europeans; while the mere classing of monetary with metrical systems would affront a great political party, whose leading men look upon the fixing of a monetary standard as a most important function of a sovereign state, and who would undoubtedly defeat the ratification of the proposed agreement by the United States Senate.

The committee, having adopted on first reading its list of specified classes of differences, deferred its final decision until the various governments could be consulted. As a result of this consultation, Professor Zorn proposed the suppression of the entire list, for the reason that the German Government was not in a position to accept obligatory arbitration and felt that it had already conceded much in accepting the Permanent Court of Arbitration. Professor de Martens then proposed that the four classes of cases introduced by the German Government into its arbitration treaties with separate nations should be substituted for the list provisionally agreed upon. But the German representative declined this clever compromise, with the remark that "after the Permanent Court had been put in operation the opportune moment might come when, after individual experiments, a list of cases obligatory for all could be agreed upon. But to force this development unduly would be to compromise the principle of arbitration itself, with which we all sympathize."

In the face of this important opposition, a determined effort was made by some members of the committee to have a majority recommendation of the proposed list reported to the commission and conference; but the representatives of Great Britain, the United States, Italy, and Austria opposed this departure from the rule of unanimity which had thus far been observed. The committee accordingly reported, and the conference adopted, only the statement (article 19) that, independently of existing general or special treaties which impose on the signatory powers the obligation to have recourse to arbitration, these powers reserve the right to conclude, either before the ratification of the present convention or subsequent to that date, new agreements, general or particular, with the object of extending obligatory arbitration to all cases which they may consider possible to submit to it.

This statement of a "self-evident fact" was regarded as evidence of the First Conference's failure, in so far as obligatory arbitration was concerned; but the committee's refusal to push its list before the conference was justified on the ground that otherwise the Permanent Court could not have secured the sanction of the German Government and probably of several others.

That the work of the First Conference in the direction of obligatory arbitration was not entirely barren is evidenced by its adoption of article 27, which made it the duty of the signatory powers to remind the parties to a dispute that the Permanent Court is open to them, and which was advocated and adopted as a step in the direction of obligatory or at least of "forced voluntary" arbitration. Baron von Bieberstein, of Germany, also testified, in the Second Conference, to the fruitfulness of the First Conference's work in behalf of obligatory arbitration, as follows:

> In the course of our debates the fortunate fact has been mentioned that a long series of other treaties of obligatory arbitration have been concluded between various states.[1] This is genuine progress, and the credit of it is due, incontrovertably, to the First Peace Conference.

What has been called in this article *inclusive* obligatory arbitration was presented to the conference of 1907 by the Marquis de Soveral, of Portugal, who presented a list of specified classes. This list was based on the treaties concluded by various powers since 1899, and on the model list adopted by the Interparliamentary Union at its meeting in London in 1906, which list, in turn, was based on the Russian list submitted to the First Peace Conference.

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[1] Mr. Choate had said: "I believe that some thirty treaties have been thus exchanged among the nations of Europe alone, all substantially to the same purport and effect."

The Portuguese list was added to by several other delegations, and included all together thirty classes of differences. All of the classes proposed to the First Conference, with the exception of the navigation of international rivers and interoceanic canals, and of the treatment of wounded and sick soldiers, were mentioned in the list, and in addition were included those differences arising out of the interpretation and application of treaties relating to the following matters: Workingmen's protection, the gauging of ships, wages and estates of deceased sailors, regulations for commercial and industrial associations, the exaction of ordinary taxes and imposts from aliens, customs duties, the acquisition and ownership of wealth by aliens, civil or commercial procedure, repatriation, dues levied on ships (for wharfage, light-house service, and pilotage), and salvage dues imposed on damaged or shipwrecked vessels, private international law, emigration, geodetic questions, and diplomatic and consular privileges.

Some of these classes received long and earnest consideration in the committee of examination, while many of them were not discussed at all, and some were neither discussed nor voted upon. Treaties in regard to navigation and commerce, although not voted upon, received the longest consideration. An effort was made to decide upon some method of determining which of such treaties should be regarded as purely judicial, and neither political nor economic, and which of them should be regarded as affecting neither the essential interests nor the independence of the parties to the dispute. This effort having failed, an attempt was made to classify such treaties according to the matters dealt with by them; but here also, as Dr. Drago, of Argentina, pointed out, a commercial treaty dealing with a single matter — import duties, for example — might be either or both judicial and political; and, as Baron von Bieberstein observed, matters which are theoretically judicial may become political in time of controversy. A subcommittee was appointed, however, to analyze and classify the various kinds of commercial treaties, and its report enumerated several kinds; but each of these was considered to be liable to the objections just mentioned.

The debate on commercial treaties illustrates the kind of objections made to all of the classes of cases in the proposed list. The authors of the list, especially M. d'Oliveira, of Portugal, and Sir Edward Fry, of Great Britain, made an able defense of it. But Baron von Bieberstein, the author of most of the objections, voiced what seemed to be the dominant belief of the committee when he declared that "the question is decidedly not yet ripe, and it would be imprudent to try to answer it before it is ripe. In prematurely voting obligatory world arbitration, we should only scatter seeds of discord among the nations."

The utmost that could be accomplished, as far as the list was concerned, was to force it, item by item, to a vote, which proved to be an indecisive one in every instance. Of the twenty-four classes voted on by the committee, only eight received a majority vote, none of the eight receiving a larger vote than twelve to four, with two abstentions. Of the eighteen countries represented on the committee, from four to nine cast adverse votes on each ballot; two delegations (Germany and Austria) voted against every one of the classes, and two others (Belgium and Greece) either voted against every one, or abstained from voting at all; while only five (France, Norway, the Netherlands, Portugal, and Servia) voted for all of them.[2]

The practical difficulties which were the alleged reason for the defeat of the proposed list of specific classes of disputes were attempted to be dealt with by the proposal of what may be called *exclusive* obligatory arbitration. This was a proposal to submit to obligatory arbitration all classes of differences, with certain exceptions. This had been the method of the First Conference in seeking to facilitate a resort to voluntary arbitration, and the delegations of Brazil and the United States sought to apply it in the Second Conference to the adoption of obligatory arbitration.

The Brazilian proposition provided for the arbitration of *all* questions which can not be settled by diplomacy, good offices, or mediation, except those which affect independence, territorial integrity, essential interests, domestic laws or institutions, or the interests of third parties. M. Ruy Barbosa, of Brazil, defended all of these exceptions as being either necessary or desirable; but the proposition was objected to by several delegates, and for various reasons. Some of its opponents argued that, since in accordance with the proposition the exceptions were to be interpreted solely by the parties to the dispute, they would leave absolutely nothing of obligatory arbitration except the name. Professor de Martens opposed it for the reason that it would exclude the majority of the questions which were the object of fifty-five arbitral awards during the nineteenth century; and Dr. Drago remarked that a general rule with such vague and sweeping exceptions would be much less desirable or practicable than a list of specific classes. The majority of the committee shared the opposition's point of view, and the Brazilian proposition was abandoned.

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[2] The vote in the commission resulted in thirty-three ayes and eleven noes for *some* list of classes, and thirty-one ayes and thirteen noes for the proposed list.

The proposition for exclusive obligatory arbitration which received by far the most careful consideration in the conference, and which came near to immediate success, was the one presented by the delegation from the United States. This provided that "differences of a judicial kind, and above all those relating to the interpretation of treaties existing between two or more of the contracting states, which may arise between the states in the future, and which shall not have been settled by diplomatic means, shall be submitted to arbitration, on the condition that they affect neither the vital interests nor the independence or honor of either of the said states, and that they do not affect the interests of other states not parties to the controversy." The relation of any case to vital interests, independence, and honor is left by the proposition to the decision of each party to the dispute.

The debate on this proposition was a long and truly titanic one. M. Bourgeois, of France, opened it by recalling Professor Zorn's prophecy of 1899 in regard to obligatory arbitration's "opportune moment," and inquired if that moment had not arrived. The representatives of seventeen powers took part in the general discussion which followed. Thirteen of these were "small powers," and every one of them advocated a general treaty of obligatory arbitration. Two of the four "large powers" (the United States and Great Britain) favored a general treaty, and Austria favored such a treaty "in theory," but reserved its decision on the treaty proposed; and the fourth (Germany), opposed a general treaty, while advocating heartily the conclusion of treaties between pairs of states.

Germany's spokesman in the general debate was Baron von Bieberstein, who, in the course of a memorable speech, announced Germany's entire conversion to obligatory arbitration since 1899, but insisted that only by separate treaties between the several states can the good cause be really advanced; while a general treaty would necessarily be too vague and elastic to be practicable, would be a formula instead of a fact, would be an additional cause of international differences (because of the difficulty of its interpretation), and would be a great detriment to the genuine progress of obligatory arbitration by means of separate treaties.

Germany's first spokesman in the four weeks' debate in the committee of examination was Dr. Kriege, who stated emphatically that his delegation would vote against every proposition to establish obligatory arbitration by means of a world treaty, and that it would oppose the American proposition for the reasons, first, that its reservations permitted merely the *name* of obligatory arbitration; second, that the necessity of each dispute being passed upon by a legislative body, such as the United States Senate, reduced still further the chance of any real arbitration; third, the fact that the authors of the proposition deemed it necessary to hedge it around with such precautions showed only a mediocre confidence even on their part in the vitality or utility of the institution; and, finally, the adoption of a world treaty would seriously jeopardize the development of genuine obligatory arbitration by means of separate treaties.

Dr. Kriege's emphatic frankness was soon replaced in the committee by Baron von Bieberstein's skill in diplomacy and debate; and this was ably seconded by the energetic determination of M. Merey, of Austria. Under the Baron's lead, the opposition took the form of suggesting difficulties in the proposed treaty. What would be the force of an arbitral award under a general treaty as regards powers not parties to the dispute? Would it have the binding force of a precedent upon them also? How can the executives in such countries as Great Britain, France, the United States, etc., enforce an award if the legislative power is opposed to the enactment of the requisite measures? How can any distinction be made between cases coming under the jurisdiction of national courts and those subjected to international arbitration, which will not reduce the latter class of cases to almost nothing? How can the United States Government enter into any world treaty of genuine obligatory arbitration, if the United States Senate must exercise the right of approving not only the world treaty itself, but also a special treaty (*compromis*) determining the object, scope, etc., of the arbitration of every individual dispute?

Such were the questions urged by the opposition; and so long a consideration was required for them that each of them, except the last, was referred to a special subcommittee for solution. The last question became the subject of an animated and repeatedly outcropping debate between M. Merey, of Austria, and Count Tornielli, of Italy, on one side, and Dr. Scott, of the United States, on the other, the last named receiving in this oratorical duel, although he by no means needed it, the powerful support of Professor Renault, of France.

Ambassador Choate, Dr. Scott, Dr. Drago, M. Bourgeois, Professor Renault, Sir Edward Fry, and Professor de Martens were the leaders on the affirmative side of the debate. They championed the American proposition with the arguments that its reservations were desirable in themselves and necessary for its adoption; that they existed in most separate treaties, and would not prevent all arbitration under a general treaty any more than they had done under separate treaties; and that a general treaty would not hinder the conclusion of separate treaties side by side with it, but would give the sanction of the whole civilized world, in a very emphatic form, to the principle of obligatory arbitration, and thus greatly aid its progress in the submission of more and more cases under the general treaty, and in the conclusion of more and more treaties as well.

"There seems to be no intelligent reason," said Mr. Choate, "why nations, having at stake grave interests from which may arise possible differences with other nations, and who have already separately agreed to submit such differences to arbitration before the tribunal of The Hague, should not all together agree to exactly the same thing, and why other nations should not follow them in the paths of peace so happily inaugurated."

"Do not let us, then," Dr. Drago urged, "be paralyzed by the fear of the subjunctive, by imagining what might happen, but which happens rarely. The project of to-day, incomplete as it may seem, plays a rôle which is eminently practical; it prepares the way, it clears the field, it saves time for those who follow us."

Sir Edward Fry replied to what he called Von Bieberstein's "subtle and minute critique" by saying that the Baron had succeeded in proving the worthlessness of an identical provision for obligatory arbitration in a treaty concluded between Germany and Great Britain in July, 1904. He admitted that in view of the reservations in the proposed treaty, its obligatory character was not very pronounced and that the *vinculum juris* could be broken without difficulty. "But," he said, "the nations of the world are not controlled solely by *vincula juris;* and I believe that the treaty, however weak it may be from the legal point of view, will have none the less a very great moral value as being the expression of the conscience of the civilized world."

At the end of this long debate, which may not be dwelt upon further here, a vote was taken in the commission on the United States proposition, with the result that thirty-five delegates voted for it and nine against it.[3] The minority included the delegations of Germany, Austria, Greece, Roumania, and Turkey, which had invariably voted in the negative, and the delegations of Belgium, Bulgaria, and Switzerland, which usually voted in the negative; while the delegations of Japan, Luxemburg, and Montenegro had invariably abstained.

The opposition, having prevented the unanimous adoption of the proposed treaty, next advocated the passage of desires (*vœux*) designed to shelve the whole question. The majority, under Mr. Choate's leadership, defeated this attempt to make the commission "stultify itself," and an apparent *cul-de-sac* was reached. The persuasive diplomacy of Count Tornielli, who had nearly always voted with the majority, and the optimistic eloquence of M. Bourgeois were then brought into play, and the commission consented to the appointment of a committee which should report a resolution embodying the progress already made. This committee was composed of M. Bourgeois and M. Nelidow of Russia, the president of the conference, whose task was to "make known to the world," in the words of M. Bourgeois, "that the cause of obligatory arbitration issued from the Second Peace Conference victorious and not vanquished." It performed its task by reporting that —

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[3] The vote in the committee had been fourteen in the affirmative and four in the negative.

> The commission is unanimous, first, in recognizing the principle of obligatory arbitration; second, in declaring that certain differences, and especially those relating to the interpretation and application of international treaties, are capable of being submitted to obligatory arbitration without any restriction whatever.

The commission adopted this report by a unanimous vote, except that the delegations of the United States, Haiti, Japan, and Turkey abstained. In a subsequent plenary session of the conference the report was adopted by a vote of forty-one ayes and three abstentions (Japan, Turkey, and the United States). The Japanese delegation stated its reason for abstention from this vote to be the fact that it had taken no part in the discussion of the question; the Turkish delegation alleged "lack of instructions" to be the reason for its abstention; and the United States delegation was opposed to the adoption of the report, although it abstained from casting a negative vote, for the reason, as stated by Mr. Choate, that "it is a surrender by the commission of the advanced position which, by a vote so decisive, it has already attained — and not because we are not in favor of the principle of obligatory arbitration, for that is what we have striven for from the beginning."

The *principle* of obligatory arbitration, then, was endorsed unanimously (except for Japan and Turkey) by all the governments of the civilized world assembled in the Second Peace Conference; the application of this principle in a *general treaty* received a three-fourths vote; and although a general treaty for either *inclusive* or *exclusive* obligatory arbitration failed of adoption by unanimous vote, the opposition to it was based, by its German and Austrian leaders, on the repeatedly expressed and strongly emphasized reason that such treaty might injure the progress of obligatory arbitration by means of separate treaties, of which they avowed themselves ardent advocates.

The *practice* of obligatory arbitration received, indirectly but undoubtedly, a great impulse from the Second Conference in its adoption of arbitration for the collection of contractual debts, and in its establishment of the International Prize Court.

It is true that the German and Austrian delegations, while supporting the Porter proposition throughout its discussion, denied that they were thereby supporting the cause of obligatory arbitration in a world treaty; but the representatives of France and Portugal openly welcomed the proposition for the reason that it was a shining example of that kind of arbitration. It is true, also, that the delegations of Roumania, Switzerland, and Turkey at first opposed the Porter proposition lest it should be placed in the convention for the peaceful settlement of international differences, in association with the articles relating to arbitration, and thus be officially stamped as an example of obligatory arbitration; but General Porter, in wisely consenting that his proposition be made the subject of a separate convention, and thereby allaying that particular kind of opposition, could well afford to forego a name for the sake of securing a substantial victory — a victory which was not only one of the crowning glories of the Second Conference, but was won, in spite of diplomatic disguise on the part of its friends and in spite of vehement denial and self-deception on the part of its would-be enemies, within the field of obligatory arbitration. The International Prize Court, although designed merely "to permit an appeal" in prize cases from national tribunals to an international court, is another decided step in the *obligatory* arbitration of a certain class of international differences. It is more than this; for it lifts this class of differences above even obligatory *arbitration*, and subjects them to a virtual court of justice. As the first truly organized international court in the history of the world, it is quite explicable that Sir Edward Fry should have hailed it as the most remarkable of all the measures adopted by the conference; and as largely the outgrowth of the German delegation's initiation and support, it may well be hailed as Germany's *amende honorable* for its opposition to America's proposition for a world treaty of obligatory arbitration.

WM. I. HULL.

# DISARMAMENT

Universal peace is the hope of the whole world — peace between individual men, peace between social groups. It has been the heart's desire of good men and the dream of poets and philosophers since time immemorial.

Scientific study and investigation of the subject, however, only began with the convening of the First Hague Conference. The most remarkable and most hopeful result of this study has been the decline of agitation for national disarmament, or limitation of armaments. It will be recalled that the limitation of armaments was the chief object of the Russian Emperor in issuing the call for the First Hague Conference, and stood at the head of his famous rescript of August 24, 1898. Strangely enough, the subject was omitted altogether in the call for the Second Hague Conference. It will be recalled that at the First Conference the subject was taken up with alacrity by almost general consent, and was assigned as the first question for investigation by the first committee. At the Second Hague Conference the subject was not taken up seriously and was not assigned to any committee. Investigation brought out — as it must always bring out — the fact that the causes of war lie deeper than armaments and that armaments have other functions besides that of war; that under existing conditions disarmament is impossible; that any attempt to bring it about would be fraught with disaster; and that the agitation for disarmament is liable to be harmful to the cause of peace itself.

The more the general subject of peace is investigated the less important becomes the question of disarmament. Indeed, enthusiasm on the subject is becoming a sign of superficiality on the part of the individual, and of insincerity on the part of the nation. All that was done on this subject by the two conferences of The Hague was to recommend to the nations the "study of the question" "at home." Now, the study of the question is eminently desirable, not only as the means of educating men out of the popular error of depending upon disarmament, but also as a means of turning the feet of the wise seeker, who loves peace, out of this blind alley into the path that really leads to the great goal of general peace.

All life in this world is cast in the midst of dangers — dangers of derangement within, dangers of violence without. Throughout all nature, from the lowest form of simple protoplasm up to the highest social organization found in a great complex nation, the first law is self-preservation. No living thing, whether plant, animal, man, or nation, can hope to survive without large provision of self-defense and for procuring things necessary to sustain life. In all organizations the most important fundamental function is the one intrusted with providing self-defense. In the case of nations this lies in the instrumentalities of armaments. Where life may be in danger all other functions must he held subject to this function of self-defense.

Indeed, broadly speaking, all characteristics, traits, habits, institutions, in plants, animals, and men, have had their origin, motive, and evolutionary history in efforts for better self-preservation, and thus far more for self-defense than for procuring the necessities for life. Peace between men is no exception in its evolution. Kindred families formed clans for the primary purpose of a better defense against a common foe, and only then did inter-family wars decline; kindred clans formed tribes for the same purpose, and only then did clan wars decline; kindred clans formed nations for the same purpose, and only then did tribal wars decline. The time is ripening fast under the annihilation of space for nations to form unions for the same purpose. Ultimately, the union of nations will come together to form a great brotherhood to avoid fighting each other, or else to face the common perils that nature will probably throw across the path of all human life.

As man gains more and more control over nature's forces, he will become more and more emancipated from the law of destroying, and will come more and more under the law of serving. Cooperation will supplant strife when destroying declines. Then, and not until then, can defense against destruction be expected to decline. The transformation will, of course, be an evolutionary one. The old law giving ground to the new, only as the new demonstrates in actual experience its superiority in meeting the demands of self-preservation. Evidently the process must be slow at best, even after material conditions have thoroughly changed, for it rests in the ultimate on a change in human nature. All mankind has consciously or unconsciously the destroying heredity from all the past generations lived under the old law. Furthermore, the whole world must move forward all together. As long as some nations still arm themselves to live by the law of war other nations must be armed to resist them and restrain them.

Two of the greatest nations of the world, Japan and Russia, are just emerging from feudalism, the former being permeated with the spirit of military chivalry, and upon these two nations will depend the development of half of the human race. The very forces which are to overthrow destroying in the end only multiply manyfold at the present juncture the powers and opportunities of the nations bent on destroying. These, arming more and more as they will, must necessitate ever-increasing armaments on the part of the more advanced nations, not only for self-defense on their part, but also for keeping the peace so that the forces of transformation will have an opportunity to work. Modern armaments are thus of two directly opposite kinds — armaments for peace and armaments for war. In practical life it is only through the former that the latter can be curbed until the slower forces of transformation can work the overthrow of war. Fortunately, the naval form of armament is chiefly a question of wealth and not of men in arms, and the advanced nations are the wealthy nations, so that they can, if they would, derive complete self-defense and place a check upon the aggression of war while their citizens remained at peaceful pursuits. Unfortunately, the misguided efforts of the disarmament agitators have no influence on the backward nations, but tend, through the influence of public opinion, which is strong in advanced nations, to check the preparation of the latter institutions, the one great essential to peace at this stage of the world's progress.

In human affairs there are two methods of attaining an end — individual and collective. Individual methods come first in time, but are ultimately set aside for collective methods, as these prove superior. Up to the present time nations have only evolved individual methods of providing for self-defense — that of armaments. There is no collective armament in existence.

It would be sinful for a nation to abandon this existing method, as elementary and imperfect as it is, until a more efficient collective method has been developed and successfully applied, and then the abandonment of the more primitive method should not be precipitate, but should come as a natural consequence of its being found unnecessary and unprofitable. The proposition for universal disarmament at the present time flies into the face of the most fundamental law of life and its advocacy can only harm the cause of peace for which it professes allegiance. It is preposterous to advocate disarmament until some effective substitute for armaments is offered as a means of national self-preservation. Many substitutes exist in theory, but all are found upon investigation to be ineffective and visionary.

Among the nations there is as yet no system of law or order. So-called international law is now only where common law was in its early stage of evolution before usage had received the full sanction of courts, with this difference, that though conferences are resorted to between nations there exists as yet no equivalent of courts to give sanction to customs, so that they become binding upon all, nor does there exist the authority and power to enforce international law, or call to the bar of justice nations that violate its tenets. Valuable efforts have been made to codify the so-called law of nations, but the situation among nations is still analogous to the situation on the frontier of a new country before the advent of law and order, before the establishment of courts, before the establishment of a law-making body, before the installation of officers or agencies of authority. In such a condition, while agreements are being entered into between individuals and practices are being established that promise some day to develop into a system of law and order, still there is no effective constraint upon the primitive instincts and passions of men. The whole history of the world and the universal experience of mankind prove that in such a condition of a lack of public or collective provision for defense there must continue individual preparation, and never has there been a case of general voluntary disarmament in advance of the establishment of law and authority. An attempt at such a voluntary disarmament without authority and power to enforce observance could only prove abortive. Since the least advanced and more primitive and unbridled would be the ones to retain weapons, the attempt would only loosen the required restraint upon these and thereby retard the day of supremacy of the peaceable elements, thus delaying the advent of law and order.

Up to the present time the only restraint between nations is treaty agreement, and here, unfortunately, there is no bond for the execution of the obligations entered into. The pages of history are covered with cases of flagrant violation of solemn treaty pledges. Moreover, there is no way to insure a nation's getting even the inadequate guaranty of treaties. However just and equitable a claim may be there is no way of compelling another nation to enter into a treaty. In fact, broadly speaking, a nation to-day enjoys the benefits of treaty agreements, both as to negotiations and fulfillment, about in proportion to the size of its armaments. Clearly, international law and treaties can not even make a pretense of offering an effective means of national self-preservation.

The hopes of many have been exalted by the prospect of arbitration as a substitute for armaments. An investigation shows that arbitration to-day rests only on the insecure foundation of treaty agreements. It is true that wonderful progress has been made in this direction in the last twenty years, but the most ardent enthusiast must realize that arbitration is only in its infancy. The powerful efforts of the American delegates at the Second Hague Conference failed to secure the adoption of a "Mondial treaty" of arbitration, though great ability was shown in evolving a proposed elastic treaty of this kind. However, the result of the vote on the proposed treaty, 35 to 9 in its favor, is really a signal victory for the principle involved. A unanimous vote was secured for the principle of obligatory arbitration, though unfortunately it was coupled with the limitation that the principle should apply only to questions of a legal nature, or arising out of the interpretation of treaties. Notwithstanding, this unanimous vote for the principle marks a sweeping victory for the general cause of arbitration.

The most practical subject taken up at the Second Hague Conference was the one to remove from the field of war to the field of arbitration the question of contractual debts. While this was a most encouraging victory in the onward march, yet the complete failure to accept the proposition of the Brazilian delegate to include territory along with debts shows the incompleteness and inadequacy of arbitration.

The net result to date finds arbitration still only voluntary and confined to nations in pairs through the negotiation in each case of special treaties.

The recent treaty negotiated by the United States with various nations, known as the French type of treaty, may be taken as an example of the practical results to date between the great powers, though more general treaties have been negotiated between certain smaller powers. Article 1 of the treaty between the United States and France, which contains the substance of the treaty, reads as follows:

> Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th July, 1899, provided, nevertheless that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

It is hard to conceive of the area covered being more restricted than it is in this treaty. The limitation to questions of law and the interpretation of treaties is further sublimited by the specific exclusive of all matters of first importance, the very matters which are the main causes of war. Thus, in theory, all nations accept the general principle of compulsory arbitration, but they are careful to confine its area and to apply it in practice to almost nothing. This should demonstrate to the advocate of disarmament that arbitration has only begun its long road necessary to be traveled before it can be offered as a practical substitute for armaments, and it must be clear that progress can be won only slowly by making good each step advanced.

The governments of the world can scarcely be blamed for this caution in adopting arbitration, for really there is no provision for its enforcement, after adoption, beyond the public opinion of the world. It would be wrong for a government, as for an individual, to have vital interests hanging upon the option of another, subject only to the constraint of public opinion. I advocate in my lectures, throughout the country, the negotiation by the United States of general arbitration treaties with all nations, treaties where the nations would agree to respect each other's territory and sovereignty in that territory, and to arbitrate all other questions, but even the existence of this treaty, if it were possible to negotiate, would in no way relieve us of the necessity of maintaining armaments until an agency had been created with the authority, duty, and power to execute and enforce the provisions of the treaties. The power required for this purpose would itself of necessity have to be drawn from the armaments of individual nations or from a developed confederated organization of the world, which is still far in the future.

The delegation from Uruguay to the Second Hague Conference presented to the conference on the 4th of July a declaration proposing a tribunal of compulsory arbitration, to consist of ten or more signatory powers, bound by a treaty of alliance, to resort to arbitration in cases of dispute among themselves, and to investigate the cases of disputes between outside powers with the view of compelling them to arbitrate.

This suggestion for providing effective arbitration received but little, if any, attention. It is clear that this or any similar proposition would have to rest upon the armaments of the signatory powers and disarmament would destroy any chance of effectiveness.

Thus, we find that arbitration in its present stage is so limited that it does not profess to offer a substitute for armaments and that actually in its meager area it is dependent upon armaments for its effectiveness.

The main hope for a day when peace will reign and individual armaments disappear is found in the widening conception of and acceptance of the principle of an international organization adequate to establish and maintain between nations a condition of law and order analogous to the condition that now exists within civilized nations.

The conception of such an organization has fascinated the minds of a few great men from the days of Henry IV of France. It has only spread to large numbers in the last few decades. This spread is due chiefly to the efforts of the Interparliamentary Union, whose members are the real pathfinders and pioneers in this wonderful but unexplored realm.

As a result of the initiative and perseverance of this Union, the First Hague Conference brought forth the Permanent International Court of Arbitration, located at The Hague. This court is essentially a diplomatic body, rather than a judicial body. It has no authority of initiation, though the Permanent Bureau, under the Council of Administration, is under obligation to remind disputing nations of the existence and readiness of the court. It has no jurisdiction except what is conferred in each case by expressed treaty agreement between the nations in controversy. In substance it is only a primitive piece of machinery to facilitate and promote the application of arbitration by treaty agreement. It partakes of all the insufficiencies of treaties. The creation of this court marks a real mile-stone in the evolution of peace, but it is the height of folly to assume that its existence relieves nations in any way from the duty of providing each for its own self-defense through the only existing agency of armaments.

The movement for evolving an international organization for the administration of justice made a great stride at the Second Hague Conference, due chiefly to the efforts of the American delegation, when the conference accepted in principle and provided for the future establishment of an international judicial body.

The greatest stride of all, however, toward international organization was made when the Second Conference provided for its own successor, in a Third Conference to be held at The Hague in 1915, and accepted in principle the establishment of a self-governing international congress automatic in its assembling. An international legislative body and an international judicial body are thus passing from the realm of dreams into the realm of reality. They are as yet, however, only in the embryo stage.

No action has yet been taken to provide the equivalent of an international executive body, and it is doubtful whether any such body, even in an elementary form, can be created for a long time to come for the reason that such a body would infringe upon the sovereignty of individual nations.

If one fact was emphasized above all other facts at both Hague conferences it was that nations cherish beyond all things else the completeness of their sovereignty. Any move that might touch in the remotest way the fringe of individual sovereignty brought the delegates to their feet in instant opposition.

This characteristic marks the fundamental difference in the comparison of individuals within a nation and the nations in the world. From the earliest stages of social evolution individuals have always been under some form of subordination and restraint from society. On the other hand, nations that gather in the world's councils have been sovereign from their infancy. The annihilation of space is giving growth to a feeling of solidarity between nations, taking on the shape of a public opinion of the world. But the first and most stupendous effect has been to accentuate the feeling of national individuality. Internationalism is in the embryo; nationalism is in full bloom. The former is to be a longer and a greater growth, but the latter is the first and stronger growth. The former will slowly, progressively encroach upon the latter, but the latter will continue to determine the policies of nations for a long time to come.

International organization is the product of internationalism, as armaments are the product of nationalism. The development of an international organization will, therefore, be slow and only at some distant day can men hope to see such an organization in a position to guarantee national sovereignty and self-preservation, and not until that day can nations be expected to abandon their individual armaments.

The effectiveness of this guaranty itself, when it comes, must really rest on armaments, and the international executive will doubtless derive its power, at least in the first period, from the combined armaments of individual nations. The period of confederation during which individual armaments prevail will doubtless last, when it comes, relatively much longer for the nations of the world than it did for the States of the American Union. The difficulties arising from the reluctance to part with individual sovereignty will be manyfold greater for the nations than they were for our States, as great as they were for these. These difficulties would only be increased by any call on the nations to give up their individual armaments, the the origin and the basis of sovereignty. Individual armaments will therefore doubtless be permitted even after the period of consolidation is inaugurated, being abandoned only when by actual experience they clearly become unnecessary and unprofitable.

Thus, international organization, the ultimate hope of disarmament, is, like arbitration proper, and like treaties and international law, utterly impotent to guarantee security for the life and independence of nations, and can not, therefore, offer a substitute for national armaments. On the contrary, an attempt at disarmament would actually retard the progress of international organization and postpone the future day when such oragnization would make disarmament possible.

Other agencies are being introduced in international affairs to promote the cause of peace — notably the commission of inquiry established by the First Hague Conference. This agency has been applied with signal success in the Dogger Bank incident, and promises practical results of the greatest value. Likewise, mediation, general and special, and good offices, all of which were established by the First Hague Conference, are now in a practical form and give great promise. But obviously all of these useful agencies are utterly imperfect to guarantee security for life and independence of nations, and can not therefore be regarded in any way as a substitute for armaments. On the contrary, the existence of strong national armaments is the surest guaranty that these agencies will be chosen in preference to war to settle international disputes.

To sum up, all existing agencies, commissions of inquiry, mediation, good offices, international law, treaties, arbitration proper, and international organization, individually and collectively, fail utterly to meet the fundamental requisites of a substitute for national armaments, nor do they hold out any prospect for developing these requisites for a long time to come, nor would a relinquishment of armaments promote but rather generally retard their development. In fact, it would be in keeping with actual conditions to advocate universal arming instead of universal disarmament, for the present is of necessity the very age of armaments.

The modern annihilation of space has not only quickened the feeling of nationality but has also brought all nations within striking distance of each other, multiplying manyfold, as intimated above, the opportunities for aggression on the part of the aggressor and the danger from aggression on the part of the passive nations. War operations are now so swift in execution, and are so stupendous in magnitude, and require so long a time in preparation, that it is absolutely necessary to be prepared at the time that war comes. The penalty for being unprepared is simply staggering. The net result is that all inherently military nations have leaped to arms, transforming their countries, even in time of peace, into great armed camps where preparation for war is the chief thought and occupation of the people. Under these actual conditions unless the world is to be delivered over to the backward and military nations it would be criminal for the nonmilitary nations to remain unprepared. The first duty of self-preservation demands a great augmentation of their armaments.

Furthermore, for these nations to remain unarmed would only add to the temptation of the military nations to go to war, and would increase the profits and the rewards of war-making armaments and perpetuate the period of their existence.

Whereas armaments in the possession of the unaggressive nations serve as a restraint, and the only effective restraint upon the aggressive nations to maintain peace and thus insure opportunity for the great economic, industrial forces, the forces of international commerce, international finance, the educational, moral, and religious forces to work their slow but sure process of transformation, progressively undermining militarism and rendering armaments less and less profitable, it has always been through the establishment of temporary peace by the restraint imposed by peaceable settlers that frontier regions have been brought into a condition of law and order that finally brought about the abandonment of the practice of individuals going armed. What the world most needs at this period of transformation is for the peaceable, nonaggressive nations to arm to the limit.

Fortunately, the nonaggressive nations are more productive than the military nations, and with greater wealth and resources can more readily bear the burdens imposed.

The quickest road toward a reduction of armaments is to increase armaments and make them intolerable for the aggressive and thus put the spur of necessity behind the nations that are retarding the movement for international organization that can ultimately offer a real substitute for armaments.

It may be argued that the increasing military activities would quicken the military spirit in the nonaggressive and retard the progress of their people. This is true to a certain extent, so that the military spirit in any of the nations thus retards the progress of all, indicating the solidarity of the human race.

Advancing nations must, then, in the brotherhood of the world, carry their backward brothers along, but the combined effect of generations of military activities in peace could not produce a fraction of the militarism and retardation that could be brought about by a great war where a military nation through its great armaments vanquishes a nonmilitary nation because of its lack of preparation. Such a result would not only hurl the vanquished nation back into the depths of militarism, but would cause the whole world to conclude that the nonmilitary civilization, whatever its beauties and advantages, is premature and still impracticable.

Furthermore, as intimated above, it will appear upon examination that one phase of armaments, navies, does not produce or foster the military spirit, because it involves relatively a very small number of men. It is estimated that a first-class battleship, with a crew of 1,000 men, adds to a nation's strength the equivalent of an army corps of 50,000 men. If a nation has water approaches it can derive its chief protection and its main influence in the world from battleships and leave its population engaged in peaceful pursuits, which would create wealth upon which to base the naval power without causing a heavy burden of taxation.

This is the reason why the great republics of history have all been located on the sea and why liberal institutions have developed more rapidly within insular nations. It is a popular error with advocates of disarmament loosely and superficially to lump both branches of armaments together and to oppose navies along with armies, on the general ground of militarism. The nonmilitary nations that leave their men at work develop the resources and create the wealth necessary for naval power, so that they can, if they would, without feeling the burden, control the high seas, and not only live secure at home, free from militarism themselves, but supply the necessary restraint abroad to put a check upon the march of war, to take away the profits derived from armies, and in the shortest time bring the reign of militarism to a close.

The true friend of peace, and the man who loves his fellowman, ought at this juncture to advocate armaments on the part of the nonaggressive nations and urge forward especially the building up of their navies.

Disarmament at the present stage is not only an impossible dream, but the advocacy of it is positively harmful to the cause of peace itself. At both Hague conferences the agitation of disarmament made the nations suspicious and impeded their frank and cordial cooperation when they could really come together on other practicable and important matters in the interests of peace and humanity. Fortunately, this harmful effect was recognized early, and at the Second Conference disarmament agitation was reduced to a minimum. At the Third Conference in 1915 the subject will probably be debarred altogether.

The ill effects of disarmament agitation are not confined to the Hague conferences, but extend to the world at large, where the public has been widely mislead by the disarmament agitators into imagining that disarmament is the road and only road to peace. This misleading was the foundation of the public discontent over the results of the two Hague conferences. The disarmament agitators are really responsible for the failure of the earnest workers for peace at these conferences and outside to receive that hearty and powerful support they were entitled to receive during and after the deliberations from the press and public opinion of the world.

The most pernicious effect of this false education is found in nonmilitary nations where public opinion determines national policies. Disarmament propaganda is not undertaken and could have little effect among military nations, but is carried among the people of nonmilitary nations, and affects public opinion and causes memorials to the governments. In this way it has thwarted efforts to secure increases of naval preparation, which alone could insure national safety and promote international peace and make it possible some day to realize actual disarmament. This propaganda plays to the inherent weakness attending liberal institutions, the lack of attention to national defense, which has largely compassed the overthrow of liberal governments in the past and should be looked upon as an insidious disease striking at the vitals of the nation.

The greatest harm of all has been done in the United States. This nation has no natural or inherited hatred, but is made up of all the other nations mingled in a perfect reconciliation. It covets no territory of another nation and has an abhorrence for colonial empire. Its people do not follow military pursuits, but are absorbed year in and year out in occupations of peace. In the organization of forty-six sovereign States, under a system with legislative, judicial, and executive branches, it represents in model form the coming organization of the nations of the world, under which individual armaments will disappear. The application of the principle of equal rights and equal opportunities to the development of unparalleled natural resources has produced and continues to produce fabulous wealth. Free from the turmoils that embroil the nations of Europe and Asia, asking only that just policies prevail, America is wonderfully equipped and is the only nation equipped for the task of counterbalancing the military tendency of the present transformation period of growing armaments. Fortunately, lying over the ocean from the armies of Europe and Asia, she can do this through naval power alone. Control of the sea in the two oceans washing our shores would enable us to live in security and continue indefinitely our peaceful pursuits at home, guaranteeing absolutely the survival of the new civilization of peace based on justice, which this nation now embodies, and would enable impartial America to hold the balance of power in Europe and keep that balance permanently turned to the side of peace. It would have caused Russia to evacuate Manchuria, when our just demand for evacuation was made, thus averting the war between Russia and Japan. It would enable us now to make good the just policy of the "open door" in China, averting the world-wide wars that will ensue if contemplated attempts at the invasion and partition of China are carried out. It would enable America to lay the foundation of justice in the Pacific upon which the yellow race and white race, remaining each in its own habitat, could meet as friends in commerce to help each other, and not as enemies in war to destroy each other.

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# THE CASE FOR LIMITATION OF ARMAMENTS.

The question of limitation and even of gradual reduction of armaments must be carefully differentiated from that of disarmament, complete and thorough-going. The demand for limitation of armaments put forward by the leaders of the peace movement is often unfairly assumed to be a demand for total disarmament. The most advanced pacifists, in whatever nation they may be found, and however radical may be their views theoretically as to the duty of the nations to disarm and live together in permanent peace under the dominion of love and law, are not at the present time urging disarmament as a practical measure. They know very well that before the happy time shall come when nations will " beat their swords into plowshares and their spears into pruning hooks " in any general way a very wide educational work for the removal of false conceptions and old prejudices must be done, and the process of *rapprochement* among the nations, now so happily taking place, must be carried much farther than it has yet gone. The practical thing which they *are* demanding — and, as they think, on the best of grounds — is the immediate arrest of the present feverish rivalry in armaments, and of the attending rapid increase in the already colossal army and navy budgets. This step they hold to be not only perfectly reasonable and practicable under the present conditions of the nations in their relations one to another, but also imperatively demanded in the interests of universal justice and the common welfare of the populations on whom the burden of keeping up the exhausting rivalry falls with such peculiar oppressiveness. Only the salient features of the argument, or group of arguments, by which this demand of the pacifists is supported, can be developed in a single article.

The first and most impressive contention of the friends of peace of this way of thinking is that civilization is now so far advanced that not only is war itself out of date, but the colossal preparations for war, which meet the view in whatever direction one turns, are thoroughly out of harmony with the humane spirit, the social habits, the intellectual attainment, and the philanthropic institutions of the age. When one puts this general character of our civilization over against the colossal armaments of the time and looks at the two with clear eye, the judgment pronounced is very much like that made when one looks at black and white — their total unlikeness is seen without any argument.

Private war, which for many generations ravaged Europe, has disappeared. The duel remains in but few civilized countries, and where it is still tolerated it is for the most part a farce. Personal fights with fists or clubs are to-day nearly unknown, except among thugs and drunken brawlers, which constitute a very small portion of any ordinary community, and are easily taken care of by a moderate police force. The carrying of deadly weapons openly is no longer in vogue. The possession of concealed weapons about the person is not only illegal in most countries, but is so generally held to be disreputable that no gentleman cares to have it known that his hip pocket is the receptacle of a revolver.

Parallel with this crowding of violence and the implements of brutality into the background goes a noteworthy prevalence of social confidence and trust, rising in innumerable cases, over wide areas, into genuine sympathy, friendship, and much mutual service. Neighbor trusts neighbor. The man on this side of the street is not suspicious of the man on that side. The different sides of cities no longer look upon each other as natural enemies, to be hated and maltreated. Mountains and rivers do not now divide peoples into mutually exclusive and malevolent communities. Indeed, mountains, rivers and seas may be said no longer to exist, to such an extent have modern means of communication brought all parts of the world into direct communication with all other parts. The unity of the world, on the material side, is no longer a dream; it is an accomplished fact. Solidarity of thought and feeling, or interest and purpose, prevails within the national boundaries over great areas of territory. Philanthropies innumerable, which look after the needy and helpless, have the sympathy and support of the whole people, and these philanthropies have already been, to a striking extent, internationalized.

Educational and industrial enterprises, scientific, social, sanitary, and many other types of endeavors, both individual and collective, are marked characteristics both of national and international life. Peoples within the national borders settle their disputes, where they have any, either by direct friendly negotiation, by the arbitration of friends, or through the courts of law and equity. We have, indeed, in the case of most of the nations, within which peoples of different races and languages are compacted into nationalities largely homogeneous, reached an era of practically universal and perpetual peace. Civil war has virtually disappeared. Men and communities live together, if not without friction and misunderstanding, at least without those outbursts of passion and violence which only a few generations ago prevailed in all countries and expressed themselves in bloody and ruinous wars.

In such an advanced state of civilization in respect of individuals and separate states, where reason and common sense so largely prevail and the use of brute force is being reduced in an ever-increasing degree, it seems utterly incongruous that the nations in their corporate capacities should hold war in the highest honor, should keep themselves in a chronic state of feverish preparation for it, and should be increasing and multiplying their military and naval establishments — especially the latter — with a rapidity and at a cost never before even dreamed of. It is difficult to conceive of folly and absurdity carried to a higher pitch than this. The fact that it has always been so can no longer be made an excuse for its continuance. Bad habits in nations are even less excusable than in individuals. There is but one way in which the states which constitute the so-called family of nations can deliver themselves from the guilt and burden of this folly, and that is by taking steps at once to get together and solemnly agree that the present competitive arming shall stop short and go no further. No international act will be found easier than this, the moment the governments determine to undertake it with seriousness and with sincerity. There are many evidences which go to show that many of the governments themselves are already taking this view of the situation, though a few of them appeared at the last Hague Conference to have formed no real conception of the absurd nature of the situation.

In the development of arbitration during the past century and in the holding and results of the two Hague Conferences, an equally weighty and even more immediately practical reason for arrest of armaments is found. It is generally conceded that reduction of armaments and ultimate disarmament, with the exception possibly of a small international police force, and such limited national armaments as may be necessary to insure protection against internal disorders, will follow naturally the establishment by the nations of an adequate substitute for war, on which every nation can rely for impartial consideration of its controversies and the rendering of just judgment. If this be true, as conceded, then what has already been accomplished in this direction, by agreement of substantially all the powers of the world, would seem to demand an immediate halt in the competitive increase of armaments, until such a time as the attempt to create a world organization with a high court of nations, which has so far been successful beyond expectation, shall have broken down and proved a failure. It is true that an international high court of arbitral justice is not yet in operation. This is true, however, formally rather than really. Arbitration as a practical method of adjusting disputes between nations has been experimented with for nearly a hundred years and with singularly uniform success. Within this time at least two hundred and fifty international disputes, not to mention as many more settlements which were of minor importance, have been successfully adjusted by this means. In the case of all these settlements the award, though in a few instances severely criticised, has been loyally accepted by the defeated party. Many of the disputes so adjusted have been of a most delicate and difficult nature, in which both national honor and vital interests have been conspicuously involved. Looking only to these *ad hoc* arbitrations, it would seem that the powers of the world, practically all of which have participated in some of these settlements, have had experience enough of the sufficiency and honorableness of this method of settling differences to give them entire confidence in it, and to induce them to be ready hereafter to refer all controversies, of whatever class, except those involving the national life, to tribunals of arbitration. If a hundred years of such uniformly successful experience is not enough to satisfy them, how much, pray, will be needed to meet their demands?

Furthermore, within the past five years treaties of obligatory arbitration to the number of sixty have been concluded among all the important governments of the world. These treaties, with the exception of two or three, are, it is true, of a limited character. They stipulate the reference to the Hague Court or other tribunals of arbitration only of questions of a judicial order and those arising in the interpretation of treaties, categories which may, however, well include all disputes, of whatever nature, that are likely ever again to arise among the states, whose boundaries are in general now well fixed and whose limits and integrity are almost universally recognized and respected. The full force of these arbitral agreements is scarcely realized even by the governments themselves. The French Foreign Office has recently published, in connection with a report on the proceedings of the last Hague Conference, a chart showing in a most graphic way the binding together of thirty-five of the capitals of the world by this network of treaties. The bond thus created constitutes a new bulwark against war and a new and peculiarly strong ground for international confidence. Even in this fragmentary way, therefore, the governments have found a substitute for war in dealing with controversies, which is practically, if not theoretically and formally, adequate to the maintenance of both justice and honor in all cases of disagreement among them.

But the process here referred to has been carried much further through the Hague Conferences of 1899 and 1907. In the first of these conferences twenty-six of the powers of the world, including all those of the first rank, were represented. In the latter, practically all of the powers, great and small, took part. It was, to all intents and purposes, a world assembly, and it discussed all of the questions with which it dealt in the spirit of a world assembly. It carried on its deliberations in a way that demonstrated once for all that a world congress or parliament is in every way practical, and that problems of a universal order can be dealt with in such an assembly with fairness toward all and with a deliberateness and considerateness which will prevent the serious offending of the sensibilities of any country, small or great, and which will insure justice to each of the nations in a manner possible in no other way. The unanimous vote of the conference in favor of periodic meetings at The Hague hereafter, and the fixing of the date of the Third Hague Conference some seven years hence, with a plan for adequate preparation of the program by an international commission, has practically settled the question of a periodic world assembly, which, it is now generally believed, will meet as regularly hereafter as the national parliaments, and, though advisory only in its character at first, will grow gradually into a parliament with ever-increasing legislative powers. For the purpose of this discussion it need be only mentioned that the conference revised and considerably improved the convention for the pacific settlement of international disputes drawn by the First Hague Conference, and sent it forth as a new treaty, this time with the signatures of representatives, not of twenty-six powers, but of all the powers of the globe, with one or two unimportant exceptions. Under this convention the Permanent Court of Arbitration, set up under the convention of 1899, has become a real world court, to which all the nations are now parties, and to which every one of them may have recourse. There exists, therefore, in this arbitration court, though reference of disputes to it is still only voluntary, a substitute for war which in practice will prove itself to be entirely adequate to meet the ends of justice in any cases of difference likely ever to arise hereafter. But the conference, as is well known, went farther along this line. It voted unanimously for the establishment of a supreme world court of arbitral justice, with judges always in service and holding regular sessions — a court holding practically the same relation to the nations as the Supreme Court of the United States holds to the separate States of our Union. And if the conference's recommendation to the governments in regard to finding a satisfactory method of selecting the judges is seriously and faithfully carried out, a supreme court of the nations will be in actual existence and thoroughly organized by the time the next Hague Conference assembles. In any event, the court will be organized and put into operation at no distant day, and in the meantime the present Hague Court of Arbitration will do substantially the same work which will finally go to the High Court of Arbitral Justice.

This process of world organization and of the extension of arbitration and of arbitral justice in an organized way to the international sphere having gone as far as it has, it is difficult to understand how the governments can find any rational justification for the perpetual increase of their military and naval establishments on a scale and with a haste which would lead one naturally to suppose that no relations of friendship and coöperation existed among them, that they had never met in conference, that treaty relations were practically unknown to them, and that they were still living in the anarchic state of the barbarous ages. There is no such justification. The eminent success which arbitration has attained and the advanced state of organization of the institutions which the Hague Conferences are creating require, if the analogy of the development of law and order and the reduction of the use of force within the nations has any value, that the governments which are parties to the Hague conventions — that is, the governments of the entire world — shall at once take steps to diminish their reliance on and use of force in their relations one to another. It might fairly be contended, from the government point of view, that these institutions have not yet been developed to a point of perfection where anything like complete disarmament, or any very large reduction in the military and naval establishments, should be immediately undertaken. But it may, on the other hand, be contended with even greater force that what the governments are doing in the perpetual enlargement of these war establishments and the increasing burdens which are being laid upon the people for their maintenance is entirely out of harmony with what they are doing in binding themselves together in pacific treaty relations and with the deliberate way in which they are entering into a universal and permanent organization through the conferences at The Hague. They ought at once either to provide for the arrest of the growth of their great military and naval preparations, or to throw up the Hague Conferences, the Hague conventions, the treaties of obligatory arbitration, and the like. There is no other way in which the claim of sincerity and consistency can be maintained by them.

The ground most commonly urged in favor of an arrest of armaments is the immense and ever-increasing cost of maintaining and renewing them, especially of the new naval constructions which this rivalry necessitates. This argument for limitation, though not fundamental as those given above, is the most striking and impressive one, especially to the common mind. In a memorial recently presented to the British Prime Minister, signed by one hundred and forty-four members of the House of Commons, urging an arrest of the military and naval expenditures of Great Britain, Mr. Asquith's attention was recalled to the fact, already noted by him, that in the last ten years the expenditure on the British army had advanced from eighteen millions to nearly thirty millions of pounds sterling, an increase of 63 per cent, while the cost of maintaining and increasing the navy for the same period had advanced from twenty-two to nearly thirty-two millions of pounds, or about 44 per cent. This memorial, quoting from the Government budget, also pointed out that the total cost of maintaining both army and navy had gone up in the ten years from forty millions to sixty-one millions of pounds, an aggregate increase of 52 per cent. It is a matter of common knowledge that in the last ten years the army and navy budgets of our own Government have increased to an alarming degree, that of the navy being nearly 300 per cent, and at the present time we are spending on the two services, including fortifications, no less than two hundred and twenty millions of dollars per year. The conditions of the other great powers are practically the same. The total cost of maintaining the armies and navies of the world at the present time aggregates, according to the speech of the British Prime Minister at the banquet given to the London Peace Congress on the 31st of July of this year, not much less than four hundred millions of pounds, or nearly two billions of dollars, per year. At the lowest figure it is one and a half billions. This reckoning takes no account of the fifteen hundred millions of dollars required each year to meet the interest on the huge debts of the national treasuries, which amount in the aggregate at the present time to no less than thirty-five thousand millions of dollars, nearly the whole of which is due to the wars of the last half century. These enormous burdens affect the welfare and happiness of the people in two ways. They add, first, directly to the tax burdens of the people of the nations. The expenditure of three hundred millions of dollars and more by Great Britain on the army and navy means a tax of not less than $37 annually per family, or over $7 per individual of the entire population. In our own case the military and naval burden of taxation rises to at least $12 per family. This is no small item, considering the fact that the average income of the families of the nation is not over $600 per year each. If the present rivalry continues, the tax burden will increase in an even greater ratio, as the *Dreadnaughts* and other constructions now in contemplation will cost from two to four times as much as vessels of the same class have cost in the past. Nothing but the utmost necessity could possibly justify the governments in thus bleeding the people to keep up and increase these armaments; and the facts adduced above show conclusively that no such necessity exists. A very large amount of the money that goes in this way is therefore pure waste, and the people receive nothing in return for it except an imaginary protection, of which there is not the least need.

Again, this rivalry of armaments, besides taking so many men away from productive employments and thus reducing the national wealth, absorbs so much of the national revenue that many internal improvements, on which the welfare and prosperity of the people so much depend, have to go begging. Those who followed with any care the recent debates on the army and navy bills in Congress do not need to have this point amplified. Appropriations for river and harbor improvements, for public buildings, for the protection of forests, for improvement of the land, etc., are exceedingly difficult to obtain in amounts at all adequate to the needs, when two-thirds of the national revenue is consumed in preparation for imagined wars in the future or the payment of pensions and of interest on the war debts of the past. In this case also nothing but the utmost emergency could justify the withdrawal of these great sums of the public money from constructive enterprises, in which all the people are interested, and the devoting of them to the instruments of war and destruction.

It will be remembered by the readers of this JOURNAL that all the governments take advantage of every possible occasion to declare to all the world that their armaments are not in any sense intended for aggressive purposes, but only for defense and for the preservation of general peace. If these professions are true, or even measurably true, they constitute one of the strongest possible reasons for an early agreement among them not to go any further in piling up these costly instruments of war. But while making, several times a year of late, these loud professions, each of the important powers involved in the present competitive arming, by the course it is taking, gives the lie to the other powers making the same claims of innocence as itself. How much does this lack of positive insult, on the part of each nation, to all the others? There is something extraordinarily ludicrous in this spectacle of the body of nations each claiming to be innocent of any evil intention against the others, and yet all of them racing away at warship building, army strengthening, and fortification extension, as if its sister powers were all unmitigated liars, in whom no particle of confidence is to be placed. This conduct seems hardly more rational than that supposed of certain alarmist military and naval men, who, in the language of the late Lord Salisbury, would fortify the moon against an invasion from Mars. Has not the time come when the governments of the world should begin to proceed a little more like gentlemen in common society, who are accustomed to accept each other's word of honor as essentially true?

There remains to be considered only the question whether any single nation, or pair of nations, or small group of nations, can begin limitation of armaments without the coöperation and agreement of all the others. The course taken by Chile and Argentina in regard to the reduction of their forces on both land and sea, after the settlement of their long-standing boundary dispute, seems to be a sufficient answer to the second part of this question. These two nations have not only been more prosperous since their partial disarmament, but no less safe from attack by foreign powers, even their own nearest neighbors. Nobody has any doubt that a group of three or five of the powers of western Europe might at once, with perfect safety, without any coöperation on the part of the other powers, cease further to enlarge their armies and navies. England, France, and Germany, it would be universally conceded, could do this. France and England, possibly alone, but at any rate with the coöperation of Italy, might with security take this step, which there is no doubt would at once be followed with readiness and even great enthusiasm by the other European powers.

It is not probable, however, that any European government could be induced to see its way singlehanded to stop further increase of its military and naval establishments. But the case ought to be different with the United States. The doubling of our standing army and the still greater increase in the size of our navy have been made on the theory that, without these preparations, we should be in danger of early attack on both our eastern and western coasts. But this alleged reason for the course that the Government has taken has been nothing but pure supposition. Not a single indisputable fact has been produced in its support. We have no foreign enemies. In our entire history since the signing of the Constitution no nation has ever declared war against us or threatened to attack us. We have ourselves begun all our foreign wars. No nation is threatening to make war upon us at the present time for any purpose whatever, least of all for the possession of the Philippines. The suspicions which have been mouthed about for the last ten years against Germany have every one of them proved to be groundless. No German settlement in Brazil or any part of the Western World would accept the sovereignty of the German Empire, if freely permitted to do so, for it was from the military burdens of this Empire that they fled across the sea. And there is no evidence that the Imperial German Government has ever had any intention of attempting to impose its sovereignty on any western German colony. The recent craze over the supposed danger of war upon our Western coast from Japan has been shown from innumerable sources to be not even "respectable nonsense," to use the language of a distinguished citizen of Japan. Guarded by three thousand miles of ocean on the east and more than twice that on the west, and held in respect, so far as anybody knows, by every government on the face of the globe, as we are, it seems to many of us that, even from the point of view of adequate national defense, our Government has already gone farther than any necessity requires in the direction of arming itself against foes that do not exist, and, if they did, could not by any possibility do us serious harm, even if our army and navy were much less than they are at the present time.

The pretense that we need a steady increase of the navy to afford protection to our ever-expanding commerce has no real ground on which to stand. Piracy has gone from the seas. Commerce that behaves itself is free to go and come as it likes in any quarter of the globe, subject only to regulations to which the commerce-carrying vessels of all the powers are alike amenable. Our foreign trade would be just as safe and untrammeled if we had only a half or a quarter of our present war fleet as it is now. For commerce is an international thing, and the real protection of it is not warships at all, but the common interest of the nations and peoples in it and the general spirit of fairness, justice and confidence, of give and take, with which our civilization is now so largely pervaded. It is this interest and this spirit of trustful mutuality that have made the great international trade of our day possible, that have built it up to such immense proportions, that sustain it and make it secure, for us as well as for other peoples. The fact is that the greater our foreign trade the fewer battleships we need to protect it; for its increase unites us more and more widely and intimately with all parts of the world, to whose interest it is, as well as to ours, that our merchant ships should go and come, enter ports and leave them, with the fewest possible dangers and obstacles. From this point of view, a half dozen up-to-date swift cruisers would be amply sufficient to afford protection against violence to any of our ships of commerce which might possibly still take place in some out-of-the-way places remote from the general influence and control of the civilized powers, though it would be very difficult to point out where such out-of-the-way places can any longer be found.

It hardly seems worth while to try to strengthen the case for limitation of armaments on the part of our own country by a criticism of the claim that we have for the first time, since the Spanish war, become a world power, and hence find ourselves under the necessity of making our navy steadily bigger in order to be able properly to play the new rôle that has come to us among the nations of the earth. This extraordinary bit of reasoning has been much used by the big-navy promoters, but the assumptions on which it is based are so vague and indefinite that a long preliminary discussion of them would be necessary before one could deal directly with the argument in any intelligent and comprehensive way. Have we for the first time become a world power? In what does a world power consist? What is the pretended new rôle that, as a world power, we are to be compelled to play? Must a new world power follow necessarily the militaristic and aggressive policies and methods of the old ones? Must world powers, old or new, forever stick to the crude and barbarous and brutal agencies and ideas which have marked the past? The examination of these and similar preliminary questions would lead the discussion too far afield. Suffice it to say that whatever we may have become, as a result of the Spanish war, this transformation does not in the least change our general continental situation between the two great oceans, nor has ten years of possession of our island dependencies furnished a single reason for the development of our fleet beyond its present proportions. The transformation does not modify, in any important respect, the general character of the advanced civilization in the midst of which we as a people live, and from whose high moral obligations and behests we can not escape. It does not break down — it rather increases — the growing unity of the world, the complexity and strength of the new world society with its widening coöperation and sympathies, its growing trust and its sensibly decreasing need of reliance on brute force. It has strengthened rather than weakened the bulwark which the colossal and ever-expanding commerce of the world is erecting against war and, still more important, against international enmity and explosions of passion. Nor again does the supposed transformation that has come to us alter the results of the two Hague Conferences. The laying of the foundations of a regular world assembly and the setting up of a durable guaranty of peace in the Permanent International Court of Arbitration are accomplished facts. The powerful bond of peace which has been created among the nations by the conclusion of more than sixty treaties of obligatory arbitration, to a dozen of which the United States is a party, is certainly not in the least weakened and endangered by the fact that our connection with the world has become wider and more intimate than it was a dozen years ago. Indeed, this new bond has been established since the date on which we were supposed to have become a "world power."

There is, then, in this direction not a shadow of ground for the further increase of our navy, unless the nation proposes to act the bully among the other nations and attempt to force its will upon unwilling powers and peoples regardless of justice and right, a supposition which even the most reckless defenders of a big and ever bigger navy would not care openly to champion. The whole weight of the argument for immediate limitation of our navy and army drawn from the general international situation of the world, and our own national position in particular, remains in all its force, rather strengthened than weakened by the larger and more prominent part which our country is now taking in the world's affairs.

Under these conditions it seems that the logical thing for the United States Government to do at the present time, without respect to what the other nations may or may not promise to do, would be to stop short in the increase of the army and of the navy and let it be known to all the world that it will live as if it trusted the sister nations, and is ready at any moment to unite with them in an agreement for general limitation of armaments. Such an example would almost certainly meet with an immediate and cordial response from the other nations, on whom the burdens of the present conditions bear much more heavily than upon us.

But however this may be as to the United States or any other single nation, it seems perfectly clear, under all the conditions of the times, that it is the imperative duty of the governments, in their collective capacity, to reach an agreement which at a very early day will relieve them, one and all, from the burdens which have grown to be so great and exhausting and which the peoples ought no longer to be called upon to bear. The nation that leads in inducing the powers of the world to take this step — and some nation ought at once to take the lead — will have won for itself a place of honor in the world's history, than which it would be difficult to conceive a higher or a nobler.

BENJAMIN F. TRUEBLOOD.

# THE PROPOSED COURT OF ARBITRAL JUSTICE[1]

Before undertaking a systematic and analytical exposition of the project relating to the establishment of an arbitral court of justice as approved by the Committee of Examination B and referred to the First Subcommission of the First Commission, it may be useful to devote a few lines, by way of introduction, to the Permanent Tribunal of Arbitration created in 1899 by the First Conference and alongside which it is proposed to establish an arbitral court of justice.

It will be remembered that, in accordance with article 16 of the convention of 1899, " in questions of a legal nature and primarily in questions regarding the interpretation or application of international conventions arbitration is recognized by the signatory powers as the most effective and at the same time most equitable means of settling controversies which have not been settled through diplomatic channels."

In order that this solemn declaration, based on a principle as broad as it is beneficent, might not remain a dead letter, the conference undertook the creation of a tribunal before which international controversies should be settled by arbitration. Article 20 therefore provides:

> For the purpose of facilitating recourse to arbitration in international controversies which have failed to be settled through diplomatic channels, the signatory powers agree to organize a Permanent Tribunal of Arbitration, accessible at all times and, unless otherwise stipulated by the parties, operating in accordance with the rules of procedure contained in the present convention.

The authors of the convention had in view the settlement of controversies by arbitration, and, the choice of the judges being one of the essentials of arbitration, they added in article 17:

> The arbitration convention is concluded for controversies already existing or which may arise; it may relate to any controversy or only to controversies of a certain category.

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[1] The introduction to this article (pp. 772–783), concerning the proceedings in commission, is a translation of the report which the writer of the present article had the honor to present to the conference, and which will form a chapter in a forthcoming book on the Hague Conferences.— J. B. S.

Upon comparing these articles 16, 20, and 17 it appears obvious that questions of a purely legal nature were considered at that time as being peculiarly susceptible of arbitration, and that it was hoped that by creating a permanent tribunal these questions could frequently be arbitrated and decided on the basis of respect for the law. There was reason to believe that the foundation had been laid for a real court in the legal sense of the word, except that in place of judges there would be arbitrators appointed by the free choice of the parties.

However, from the very fact that article 21 gave the court jurisdiction in all arbitration cases, it is obvious that the framers of the convention considered it possible to submit to it other problems than those of an exclusively legal nature. The unique institution which was being created was thus competent at once for purely legal questions, which it was to decide on the basis of a respect for the law, and for broader problems of an extra-juridical nature, the decision devolving in either case upon judges, or rather arbitrators, chosen by the parties at variance.

In modern nations judicial questions are decided in courts of justice by magistrates who do not derive their authority from the litigants, but in cases susceptible of an agreement to arbitrate judges chosen by the litigants are as appropriate as they would be inappropriate in a court of justice.

The difference between legal (juridical) and nonjuridical questions, as well as the procedure applicable to each, was clearly elucidated by His Excellency M. Bourgeois before the First Commission. Replying to the criticism directed by Mr. Choate and Mr. Asser against the work of 1899, he says that —

> If there are not at present any judges at The Hague it is because the conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not [he added] like to see the court created in 1899 lose its character as a real court of arbitration entirely, and we intend to preserve this freedom of choice of the judges in all cases where no other rule is provided.
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> In controversies of a political nature, especially, we think that this will always be the real rule of arbitration, and that no nation, big or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.

But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? And does not every one realize that a real court, composed of real jurisconsults, may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?

In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the tribunal of 1899 and the court of 1907 will be optional, and experience will show the advantages or disadvantages of the two systems.

With these objects in view the framers of the present draft have set out to organize a court which shall be competent primarily to decide controversies of a legal nature. However, they did not desire to render it overexclusive by prohibiting it from passing on differences of another character. Their purpose was, above all, to advance the work of 1899, giving it a new and unmistakable scope by the establishment of an arbitral court of justice to pass judicially on international controversies.

Article 20, cited above, speaks of a permanent tribunal, but every one knows that the tribunal is not permanent, because it must be organized on the occasion of every case submitted to it. The only permanent thing is a list from which the judges must be selected in each particular case. The framers of the convention also desired that the court should be accesible at all times to the parties, but their hopes have been disappointed by the material defects of the institution. It can not be said that a court which does not exist is accessible at any time, much less at all times. One of the founders and friends of the court, His Excellency Mr. Asser, said of this institution: "It is difficult, time-consuming, and expensive to set it into operation."

However, as Mr. Choate observed (First Subcommission, ninth session, pp. 2–3):

> When we read the speeches which were delivered while the establishment of this court was being discussed, we see that it was considered as an experiment and that it was hoped it might serve as a basis for the work of a future conference. Our efforts [he added] are not being directed toward diminishing this work, but on the contrary toward building up on its foundation, and we now seek the support of those who

began it. However great the result of the First Conference may have been in this regard, it could not satisfy the ever-increasing demands of the nations, only four cases having been submitted, and two-thirds of the judges, the total number of whom is about sixty, were not called upon to sit. It was certainly not owing to a lack of competence on the part of the eminent judges, and it is these very persons whom we should like to have to compose the new court. . . . It appears to me as if certain nations had failed to appear before the Tribunal of The Hague on account of the expense involved by such a recourse. We should therefore first of all provide for having the expenses of the court, including the judges' salaries, borne in common by all the signatory powers.

The absence of all continuity in the Permanent Tribunal has greatly diminished its force and its influence. Each of its meetings has been disconnected with the others, and its occasional decisions, separated by both time and the diversity of their objects, have done little to advance the progress of the science of international law. They have done no more toward establishing the international jurisprudence which we are entitled to expect from a tribunal backed by the consent of all nations.

Nevertheless, the Permanent Tribunal has done some good work, but it was within the restricted limits within which it was allowed to operate.

Let us try to make of it a Permanent Tribunal, with regular and continuous sessions. Such a tribunal would render its decisions on the authority of the united nations. It would gradually create a definite system of international law, which would have to be considered by the nations as a rule of conduct. By making this step in advance we shall justify the confidence which has been placed in us, and we shall make the work of this Second Conference truly worthy of comparison with that of 1899.

Such are the general outlines of the project which we present to you.

To point out the obvious defects of the old tribunal is by no means seeking to belittle it. It marks a stage in the evolution of arbitration, but experience shows us that although the theory worked out may have been correct the practice is susceptible of improvements. The most effectual progress will be to render the tribunal permanent in fact. If any testimony were necessary regarding the need of these improvements, what more eloquent and authoritative testimony could be found than that of M. de Martens, the advocate and one of the founders of the court, the most experienced of living arbitrators, who, during the very first days of the conference, presented a proposition regarding the establishment of a permanent judicial committee, chosen from among the members of the present court? If the father himself lays his hand on his child and suggests to him the improvements of which he is susceptible, why be astonished if the godfather also raises his voice and speaks out boldly?

The United States have always looked with favor upon international arbitration. This is abundantly shown in the cumbrous volumes of Moore's Digest, which relates the arbitration cases in which the United States have taken part. In 1899 the American delegation worked ardently together with the English and Russian delegations for the creation of the present tribunal, and the United States have appeared as plaintiff in some of the cases which it has had to examine. Having won their suit, it is by no means in the attitude of an unsuccessful litigant that they are proposing changes and modifications. Their own experience and a study of their Supreme Court have shown them that an arbitral court of justice may be created to decide the controversies arising among the sovereign members of the family of nations just as reliably and equitably as the Supreme Court decides differences of an international character arising among the States of the American Union.

The attitude of the United States has never belied itself, for they have constantly declared that to them the tribunal established in 1899 was but the first step toward a permanent arbitral court of justice which they would have liked to have had established even in 1899. The fact is they had but to consider their own past, which is still recent, in order to confirm them in this opinion. It is not generally remembered that the United States established a court of arbitration just one hundred years ago. The fundamental constitutional act, designated under the name of "Articles of Confederation," establishes, both in theory and in fact, the rule of arbitration for the solution of "international" difficulties arising among the States.

According to the text, the Congress would be the last resort in exercising jurisdiction over contests already existing or to arise regarding boundaries, jurisdiction, and other matters. Here is the way its jurisdiction was exercised. When the authorities or authorized agents of a State demanded a judicial investigation, notice of the fact was given to the other State in controversy and a day was set for the appearance of the two parties through representatives.

The parties were invited to appoint the members of the tribunal by common consent. Failing an understanding, Congress designated three citizens of each of the States of the Union (thirty-nine), and from the list thus formed each party, beginning with the defendant, could strike out a name until only thirteen remained. From these thirteen, seven or nine were drawn by lot, and the persons thus designated composed the court, which decided the controversy by a majority of votes. A quorum of at least five judges was required. In case of nonappearance of one of the parties without a valid reason, or of his refusal to take part in the formation of the tribunal, the Secretary of the Congress performed this duty in his stead. The award was final in all cases, and each State pledged itself to carry out the award in good faith. The judges had to take an oath before the Supreme Court of the State where the tribunal sat that they would perform their duties carefully and without partiality or desire for gain.

A mere cursory perusal of these provisions shows what a striking similarity there is between the Hague Tribunal and its American predecessor.

The destinies of the American Tribunal of Arbitration were of brief duration. It did not justify its creation. Lacking in the essentials of a court of justice, it was supplanted after ten years by the present Supreme Court, before which are judicially decided many controversies which, arising between sovereign and independent States, might lead to war.[2]

Will history repeat itself again?

Knowing the weaknesses and defects of the American Court of Arbitration, as well as the admirable results of a judicial adjustment of international controversies by a permanent court composed of professional judges, the United States delegation offered a scheme of organization of a regular judicial court composed of learned and experienced judges and open wide to all the signatory powers without the delays and formalities necessary in the organization of a special tribunal for each particular case.

When the First Subcommission of the First Commission met on

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[2] Missouri v. Illinois (1905), 200 U. S. 496, 518.

August 1, 1907, it found itself confronted by two propositions regarding the permanence of the international tribunal. The first was a Russian project and the second the original project of the American delegation.

The general discussion, which was continued on August 3, was on the question as to whether the establishment of a permanent court composed of judges and ready to take up and decide the questions submitted to it was desirable under the present circumstances.

On August 1 His Excellency Mr. Joseph H. Choate, first delegate of the United States, supported the American proposition. He first read a passage from a letter which President Roosevelt wrote on April 5, 1907, to Mr. Carnegie, and which was read publicly to the Peace Congress assembled at New York. The President expresses himself as follows:

> I hope to see adopted by the conference a general arbitration treaty among the nations, and I hope that the jurisdiction of the Tribunal of The Hague will be extended and rendered more permanent. I hope that judges will be appointed for a fixed term and that they will be paid an adequate salary in order that the likelihood may continually increase of having every controversy arising among great or small nations decided by this tribunal, just as a judge in our country decides among powerful or weak individuals who have recourse to him. Doubtless many other matters will be taken up at The Hague, but it seems as if a general arbitration treaty may be the most important of all.

Mr. Choate announced that the instructions given to the delegation were that it secure the acceptance, if possible, of a plan regulating the selection of the judges, so that the various systems of law and the principal languages may be equitably represented.

> In our plan [he says] we have voluntarily refrained from giving even an outline of the details of organization and operation of the court which we propose. We did not think that one nation could, by itself, determine or even suggest these details, which should be evolved as a result of discussion among the representatives of the various nations.
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> The plan which we propose to you does not change the optional character of the tribunal already established in the least. No nation can be compelled to appear before the court. The latter shall be open to all who wish to settle their differences by peaceful means.

Having thus described the project, Mr. Choate set forth its general provisions roughly as follows:

In the first article a permanent court of arbitration is to be established. This is the great principle on which the conference should pronounce at the very start. The judges should be of the highest moral standing, and be of recognized competency in matters of international law. They should be chosen in such a way that all the nations, both weak and strong, may take part, without distinction, in their appointment. They should insure an equitable representation of all the various systems of law and procedure and of the principal languages of the world, be appointed for a fixed term, to be determined by the conference, and hold their office until their successors are appointed.

According to the second article the Permanent Court is to meet every year at The Hague and sit until it has completed the examination of the cases submitted to it; appoint its personnel and, as far as not determined by the conference, regulate its procedure. All decisions of the court shall be rendered by a majority of votes.

It is expedient that the judges be of equal rank, enjoy diplomatic immunity, and receive a salary paid by the nations in common and sufficient to enable them to devote all the time necessary to the affairs of the court. The third article expresses the desire that, unless otherwise agreed, no judge of the court shall take part in the examination of controversies affecting his own nation. In other words, this tribunal is to be a regular court and have nothing in common with a mixed commission.

As indicated in article 4, the jurisdiction of the Permanent Court would extend to all differences of an international character among sovereign nations and not settled through diplomatic channels, when the parties agree to submit to this jurisdiction. The court would decide in the first resort, while remaining competent to receive appeals from other courts and to examine the respective rights and duties resulting from the conclusions of commissions of inquiry, or from the decisions of special tribunals of arbitration.

Article 5 stipulates that the judges of the court may be called upon to sit on the commissions of inquiry or in tribunals of arbitration appointed for a particular case. In this latter case it is evident that the judges could not examine on appeal a decision in which they had taken part. In short, the court would be competent to settle any international controversy which the powers might deem proper to submit to it.[3]

His Excellency M. de Martens then delivered a remarkable speech showing that the possibility of creating the Permanent Court was by no means precluded and giving the support of his theoretical and practical experience to the idea of its permanency.

> We are agreed [he said] on one essential and indisputable fact, viz, that the present Permanent Court is not organized as it should be. An improvement is needed and it is our task to make it. This task is an important one — indeed, the most important one, in my opinion, of all those devolving upon us.
>
> I have under my eyes the Russian circular of April 3, 1906, which contains the program adopted by all the powers. It speaks, first of all, of the necessity of perfecting the principal creation of the conference of 1899 — that is, the Permanent Court. The First Conference departed with the conviction that its task would be completed subsequently as a result of the steady progress of enlightenment among peoples, and as the results of acquired experience manifested themselves. Its most important creation, the International Court of Arbitration, is an institution which has already been tested and which has grouped together for the general welfare, as an areopagus, jurisconsults enjoying universal respect.

However, M. de Martens realizes the deficiencies in the work of 1899. "The court of 1899 is but an idea which occasionally assumes shape and then again disappears." This is what induced the Russian delegation to present a project, but it does not by any means mean to offer this project as the sole basis of the deliberations. The project in the first place sanctions the absolute choice of the arbitrators by the powers. The idea of the list is retained, but, considering that the arbitrators composing it should be known and be at least in part at the disposal of the nations, M. de Martens suggests the idea of periodical meetings during which the members would select a permanent tribunal of arbitration to be always at the disposal of the powers which might desire to have recourse to it.

This permanent court would be composed of three members. However, the number of judges could be increased at any time.

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[3] Mr. Scott thereupon explained technically and in detail the principles which might serve as a basis for the establishment of an international permanent court.

Instead of three members, five, seven, or nine members could be elected. This is a question of detail.

The advantage of the Russian project consists in the retention of the present foundations, on which it proposes to construct another edifice better adapted to the just demands of international life.

In words which were impressive by their eloquent brevity, Baron Marschal de Bieberstein gave assurance that the proposed court would have the support of the German delegation.

> I declared a few days ago [he said] that the German Government considers the establishment of a permanent court of arbitration as a real step in the line of progress.
>
> I wish now, while this discussion is being opened, to formally repeat my declarations in the name of the German delegation. I take real pleasure in accepting the general principles so eloquently defended by the delegates from the United States.
>
> We are ready to devote all our energy toward the accomplishment of this task which M. de Martens very correctly defined, on presenting it, as one of the most important ones of the Second Peace Conference.

Sir Edward Fry gave to the idea the support of the British delegation, and Messrs. de la Barra, in behalf of Mexico; Larreta, Drago, and Saenz Peña, first delegates from Argentina, stated that their delegations were in favor of the idea of permanency. At the following session Messrs. Esteva, first delegate from Mexico; Milovanovitch, in the name of the Servian delegation; Belisario Porras, delegate from the Republic of Panama; J. N. Leger, delegate from Haiti; José Gil Fortoul, delegate from Venezuela; Ivan Karandjouloff delegate from Bulgaria; the Marquis de Soveral, in behalf of Portugal; Samad Khan Momtas-es-Saltaneh, in behalf of Persia; and J. P. Castro, in behalf of Uruguay, stated that they agreed to the general outlines of the American project, some without any reservation and others making reservations regarding the composition of the court. Mr. Esteva, in particular, stated that he voted only with reservations "because the principles which were to serve as a basis in the establishment of the Permanent Court were of such great importance that the Mexican delegation would not give its final vote until it had learned of the various projects for the organization of the court."

During the same session of August 3, Mr. Choate called attention to the freedom which every party in controversy would have in choosing between the new institution, which was not compulsory in any respect, and the court of 1899, which it was not intended to supplant.

His Excellency Mr. Beernaert delivered an important and carefully worded address on this subject, in which, combatting the arguments adduced in favor of the proposed court, he expressed his deep conviction that the progress should be made in the old direction, and that the institution of 1899 was preferable to the one proposed to be established, which, by forcing permanent judges on the parties in controversy, threatened to violate the principle of free choice — an essential feature of arbitration.

Sir Edward Fry replied briefly to him, setting forth clearly in a few sentences the problem which the commission had to solve:

> If it were a question of supplanting the present Permanent Court by a new court to be created, I should without hesitancy side with Mr. Beernaert, but the American scheme proposes the creation of a new court *in addition* to the present court. The two courts will work together toward the same goal and the one which appears to answer the needs of the nations best will survive.
>
> The choice will be free to the nations, and it is very certain that the most effective court will be chosen.

Mr. Léon Bourgeois, speaking as first delegate from France and no longer as president, showed, in a pointed speech, that the organism of 1899 and that which it was proposed to create would each have its separate sphere of activity and its own peculiar interest and influence.

> What we must find out [he said] is whether, for limited purposes and under special conditions, it is not possible to secure the working of arbitration more quickly and easily under a new form in no way incompatible with the first form.
>
> In questions of a purely legal nature, a real court composed of jurisconsults should be considered as the most competent organ. . . . It is therefore either the old or the new system that is to be preferred, according to the nature of the cases.
>
> Thus [he concluded] we see before us as two distinct domains, that of permanency and that of compulsoriness. However, we reach the same conclusions in both domains.
>
> In the domain of universal arbitration there is a zone of possible compulsion and a zone of necessary option. There is a whole lot of

political questions which the condition of the world does not yet permit to be submitted universally and compulsorily to arbitration.

Likewise, in the domain of permanency, there are cases whose nature is such as to permit and perhaps to warrant their submission to a permanent tribunal. However, there are others for which the system of 1899 remains necessary, for it alone can give the nations the confidence and security without which they will not go before arbitrators.

Thus, it is seen that the cases in which the permanent court is possible are the same as those in which compulsory arbitration is acceptable, being, generally speaking, cases of a legal nature. Whereas political cases, in which the nations should be allowed freedom to resort to arbitration, are the very ones in which arbitrators are necessary rather than judges, that is, arbitrators chosen at the time the controversy arises.

The president having thereupon submitted the question of considering the American proposition to a vote, twenty-eight votes were cast in favor of taking under consideration the establishment of a permanent court of arbitration, and twelve states refraining from voting.[4]

The American and Russian propositions were then referred to the Committee of Examination, for working out of the project.

The Committee of Examination was therefore confronted by two projects at its first meeting on August 13, 1907. The Russian project was not discussed therein. The American project served as a basis for discussion, but it is useless to consider it in detail, for it was withdrawn in favor of a common project of the German, American, and English delegations. Later, at the third meeting of August 29, His Excellency Mr. Barbosa, first delegate from Brazil, presented a project which he accompanied by a forceful address in which he went into considerable detail. This project was afterwards withdrawn by Mr. Barbosa. Propositions from the Bulgarian, Haitian, and Uruguayan delegations regarding the composition of a permanent court were also deposited.

The Russian project sought to make use of the Permanent Court and out of its membership to select a small committee ready at any time to receive cases and to decide them. For example, the members of the Permanent Court of Arbitration were to assemble every year at The Hague in plenary session:

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[4] Those voting in favor of the motion were Germany, United States, Argentina, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Dominican Republic, France, Great Britain, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Panama, Paraguay, Netherlands, Peru, Persia, Portugal, Russia, Salvador, Uruguay, Venezuela. Those refraining were Austria-Hungary, Belgium, Denmark, Spain, Greece, Norway, Roumania, Servia, Siam, Sweden, Switzerland, Turkey.

> (1) To select by secret ballot three members from the list of arbitrators, who must be ready at any time during the ensuing year immediately to constitute the Permanent Tribunal of Arbitration; (2) to take cognizance of the annual report of the Administrative Council and of the International Bureau; (3) to express the opinion of the Permanent Court of Arbitration upon the questions which have arisen during the sessions of the tribunal of arbitration, as well as on the acts of the Administrative Council and the International Bureau; (4) to exchange their ideas regarding the progress of international arbitration in general.

The members of the Permanent Tribunal of Arbitration were to be eligible for reelection. An examination of this project shows that every year the members of the Permanent Court of Arbitration, of whom there could not be more than four from each state, were to assemble at The Hague, to form themselves into a committee on arbitration, and to devise means whereby arbitration and the Permanent Court might be made more effective. They were to choose from their assembly three members, who, when selected, would probably reside in The Hague and devote their time exclusively to cases presented for their decision. The distinction is thus clearly drawn between the Permanent Court on the one hand, which is in reality nothing but a panel or list of judges, and a tribunal of arbitration and a court in the ordinary acceptation of the term. The Russian project if adopted would have been a decided improvement upon the present Permanent Court, because it would have created a tribunal in session before which litigants might appear. The aim of the project undoubtedly was to establish this permanent tribunal and to interest the permanent panal in the procedure by having them assemble at The Hague and constitute the tribunal for the succeeding year. The Russian project was not discussed in the Committee of Examination, but the suggestion of a permanent tribunal composed of three members appears in the project draft by the committee and ultimately accepted by the conference.

The Brazilian proposition was designed to constitute a workable tribunal in accordance with the requirements of juridical equality not merely in right but in the exercise of the right. Each signatory power was to designate a person able and willing to serve as a judge, and each person so designated was to serve for a period of nine years. In order that the court should deliberate in plenary session it was necessary for at least one-quarter of the members appointed to be present, and in order to assure the possibility of this the members appointed were to be divided into three groups, according to the alphabetical order of the signatures of the convention. The judges classed in each of these three groups were to sit in rotation for three years, during which they were obliged to establish their residence within twenty-four hours of The Hague, to which they might be summoned by telegraph. The group would thus form the court, but all members of the court were to have a right, if they desired, to attend all the plenary sessions even although they did not belong to the group in session. The parties at variance were to be free to submit their controversy to the full court or to choose from among the members of the court such number of judges as they desired to consider their controversy. The court was to be convened in plenary session to pass upon controversies submitted to them by the parties, or if the matter in litigation was referred to a less number of arbitrators, then the full court was to be convened upon the request of the arbitrators in order to settle a question raised among them during the trial of the case.

The Brazilian plan was thus to have each nation, large or small, designate one judge, and as forty-six nations were invited to The Hague we may place the number of judges at forty-six. These forty-six judges were to be arranged in an alphabetical table and the first third were to be set aside as group 1, the second third as group 2, and the last third as group 3. The membership of the group would not be more than fifteen; it might be less, because several nations might appoint one and the same person as their representative. The Brazilian plan differed from the project elaborated by the committee in that it was inconsistent with the existence of the Permanent Court as constituted in 1899, and accordingly the Brazilian plan contemplated the abolition of this court and the substitution of the new in its place. As, however, the project was not discussed by the committee and was withdrawn by Mr. Barbosa it does not seem advisable to discuss it in detail.

As far as is known the American delegation was the only one that went to The Hague with express instructions to propose the establishment of a permanent court of justice composed of judges and acting under a sense of judicial responsibility. The Secretary of State is a partisan of a permanent court and he instructed the American delegation as follows:

> The method in which arbitration can be made more effective, so that nations may be more ready to have recourse to it voluntarily and to enter into treaties by which they bind themselves to submit to it, is indicated by observation of the weakness of the system now apparent. There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different States, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration. It should be your effort to bring about in the Second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the

best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments. [Instructions to Delegates, p. 8.]

In the passage just quoted the difference between the court of 1899 and the proposed court of 1907 is pointed out clearly. The first is a court composed of honorable men with high standards of justice but who do not need to have had legal training or judicial experience. The court proposed by the American delegation was to be a court in the technical sense of the word, composed of judges who had had experience in the practice and interpretation of law, and therefore were competent to decide difficulties presented to them " by judicial methods and under a sense of judicial responsibility." The judges were not to be selected from any group of countries but chosen in such a way that the different systems of law and procedure as well as the principal languages of the world might be fairly represented.

It will be noted that the instructions of Mr. Root determined the character of the court, and the first article of the project as ultimately drafted is little more than a paraphrase of his instructions; for the court is not only to be free and easy of access but to be " composed of judges representing the various juridical systems of the world and capable of insuring continuity in jurisprudence of arbitration."

After weeks of careful debate and discussion in the Committee of Examination, and after some slight amendments in the First Commission a project of thirty-five articles was eventually adopted by the conference, and recommended for adoption as soon as the powers should agree upon the choice of judge and the constitution of the court. The project of a convention which it is hoped will be put into effect by the powers in the near future is divided into three parts — articles 1 to 16 dealing with the organization of the court; articles 17 to 33 regulating its jurisdiction and procedure; and articles 34 and 35 of a purely formal nature regarding the duration of the convention and its ratification.

The Permanent Court of Arbitration was established in the year 1899 " with the object of facilitating an immediate recourse to arbitration for international differences which could not be settled by diplomatic methods." The proposed court of 1907 had the same end in view, namely, to promote the cause of arbitration. But the new court if established, while it might compete with the old, was not intended to supplant it, for the contracting powers agree to constitute it "without altering the status of the Permanent Court of Arbitration." The Permanent Court of 1899 was to be accessible at all times, but however much one may commend it, still we must admit that it did not and could not realize the intention of its founders in this respect. Indeed, the name of the institution is very unfortunate, because there is in reality no permanent court. There is at best a panel or list of judges from whom the signatory powers may select a number to form a temporary tribunal for the decision of a case submitted to it. The list is indeed permanent; the tribunal is temporary, and has to be constituted anew for each case.

As the Permanent Court is not a court but a list; as the tribunal constituted with much difficulty and delay for each case is not permanent, but temporary and occasional, the real designation of the so-called court as a court is a misnomer; the permanence of a nonexisting court is a fiction, and the pretension that a nonexisting court to be created from a list of judges is not only permanent but "accessible at all times" is self-deception. The true nature of the Permanent Court was clearly and repeatedly pointed out by Dr. Zorn during the First Conference. Germany accepted it because it was not permanent, although fearful that if established it might become so. The designation of the list as a permanent court instead of a mere panel has created the impression that a court really exists and has rendered difficult the creation of a new and different institution. Such is the magic of a name.

The project of 1907 contemplated the creation of a truly permanent court which in whole or in part should hold regular terms and be in session at The Hague during the life of the convention. The new institution was to be easy of access inasmuch as it would be open to any contracting party, and it was to be free in that the expenses of the court, as distinct from the fees of counsel, were to be borne by the community of nations. The temporary tribunal selected by the powers in controversy might be composed of diplomats or jurists, and would not necessarily represent anything but the confidence of the appointing parties; whereas the Court of Arbitral Justice was to be composed of judges representing the various juridical systems of the world and capable of insuring continuity in jurisprudence of arbitration. This last qualification is of fundamental importance because an international court should represent the various juridical systems of the world, for it is only by judges trained in these various systems that we can hope to create and develop that international equity which would be at once the honor and the justification of the court. And finally, the importance of the continuity in jurisprudence of arbitration should not be overlooked, because each decision of a permanent court, if not absolutely binding on the discretion of the judges, would nevertheless form a precedent, and a succession of precedents would build up a compact body of international law and jurisprudence. This would be the natural consequence of a permanent court composed of judges sitting for a longer or shorter time. It can hardly be expected that the judgment of an occasional court will profoundly influence the judgment of a subsequent temporary tribunal composed of different judges. The *esprit de corps* is lacking, even although each body acts under a sense of judicial responsibility.

The convention of 1899 provided that the panel should be composed of not more than four persons nominated by each signatory power, " of recognized competence in questions of international law, enjoying the highest moral reputation, and disposed to accept the duties of arbitrator." The judges of the proposed Court of Arbitral Justice were likewise to be persons of moral reputation and recognized competence in matters of international law. So far the institutions have a point in common; but the judicial nature of the creation of 1907 at once appears in the further requirement that the persons designated as judges shall possess the qualifications required for judges in the higher courts of their respective countries or shall be jurists of recognized competency. We see, therefore, that the conference of 1907 sought to establish a permanent court composed of judges who either had occupied judicial positions or who were qualified for it by the laws of their respective countries in order that, acting under a sense of judicial responsibility, their judgments would command the respect alike of plaintiff and defendant. The first article stipulated that the Court of Arbitral Justice was to be established without striking a blow at the Permanent Court of 1899. In order to establish a connection between the two, although the two courts were to be independent of one another, it was hoped that the judges of the new court should be appointed as far as possible from the permanent panel of the old. It was felt that the nations would have greater confidence in the new institution if it were not opposed to the creation of 1899, but stood in close relation to it.

The judges of the permanent panel of 1899 were to be selected for a period of six years, subject to reappointment, and in case of death or resignation their places were to be filled in accordance with the method of their appointment. The judges of the Court of Arbitral Justice were to be appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council, and were eligible for reappointment. In case of death or withdrawal, the vacancy was to be filled in the manner of the original appointment. The appointment, however, was to be for the full period of twelve years. A long period of service was thought essential to the success of the projected court, for however good a judge may be at the date of his appointment experience on the bench develops his faculties and makes him more competent. Experience likewise often develops latent and unsuspected faculties. The framers of the convention thought that six years — the tenure of the judges of the Prize Court — might be too short a period to develop the full strength of a judge and, wishing the world to profit by the wisdom, knowledge, and experience gained in its service, fixed the period at twelve years. The influence and importance of this long tenure on the development of international law and the continuity in arbitral jurisprudence are too obvious for comment.

The convention does not specify the number of judges necessary to constitute the court, but it is evident that a judge from each country would form a body of forty-six. This might be a judicial assembly, but it would certainly not be a manageable court. On the other hand the requirement of the first article, that the court should be composed of judges representing the various juridical systems of the world, would suggest a court of approximately fifteen persons — certainly not more than seventeen. Either number would seem large to an American who finds nine judges sufficient to constitute a Supreme Court for the forty-six States composing the American Union.

Whatever be the number of judges and the manner of their appointment, the judges are however equal and rank according to the date on which their appointment was notified, and each receives as judge of the Court of Arbitral Justice an annual salary of 6,000 Netherland florins — in round numbers, 2,400 American dollars. The projected court was to be permanent, and in order to effect this purpose the judges must either reside at The Hague or be prepared to go to The Hague so that they may decide the cases presented to the court. It was felt that a judge would feel more bound to attend to his duties if he were paid an adequate salary, because acceptance of the salary necessarily involves the duty of performance of service for which it was received. The judge therefore is to be a permanent official of the court, pledged by oath to exercise his functions impartially and conscientiously and the recipient of an annual salary during his tenure, to be paid, not by the litigants, but by the signatory powers. It may be admitted that the sum of 6,000 florins is in itself inadequate, but, on the other hand, it must be borne in mind that the judge may rarely be called into service and receives the stipend whether his court have much or nothing to do. To this sum must be added traveling expenses, fixed in accordance with the regulations in existence in his own country, and finally in the exercise of his duty during the session or in special cases covered by the convention each judge receives the additional sum of 100 florins per diem While it can not be maintained that the salary is munificent, still 6,000 florins annually, traveling expenses, and the additional compensation of 100 florins per day when acting as judge, is surely a sufficient reward to one whose sole purpose in life is not to amass wealth and to whom dignity, honor, and a consciousness of public usefulness count for something. It should also be said that the position of judge will probably not interfere with professional engagements at home; for, while it is supposed that the court will hold terms, it is not likely that continuous actual presence in The Hague will be required for some years to come. Therefore, a judge may be engaged in the practice of law or he may be a professor of law in a European university or he may be an official of government; but as judge he is an official of the court and may not receive from his government or from that of any power any remuneration for service connected with his duties in his capacity as judge (article 10). For the same reason he may not exercise his judicial functions in any case in which he has in any way whatever taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties; nor can he act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration, or a commission of inquiry; nor can he act for any of the parties in any capacity whatsoever so long as his appointment lasts (article 7). The judge, therefore, of the proposed Court of Arbitral Justice is to be a judge in the technical sense of the word, whose chief and sole duty is to the court of which he has the honor to be a member; who looks to his home country neither with fear nor favor, for it dare not reward him financially; and who, by the very nature of the position, is forbidden to appear or serve in any capacity other than judge in any tribunal constituted or recognized by the convention. If we compare the like provision of the Permanent Court we see at once that the court of arbitration is not considered a court in the strict sense of the word, because the members of the Permanent Court may act as agent, counsel, or advocate on behalf of the power which appointed them or of which they are subjects or citizens, although they are forbidden so to act for any other power. In the next place they receive their honorarium as arbiters directly from the parties, and rightly, because they are servants of the parties and are properly remunerated by them. The judges of the proposed Court of Arbitral Justice are officers of the court, and although they do not lose their citizenship by virtue of their appointment, still for the purposes of justice they are officers of the community of nations.

It has been stated that the court contemplated by the convention is to consist of a sufficient number of judges to represent the various juridical systems of the world and capable of insuring continuity in jurisprudence of arbitration. This court, which we shall suppose to be composed of approximately fifteen judges, is to meet in session at The Hague once a year and is to remain in session until all the business presented to its consideration has been transacted. But the desire of the framers of the convention was not merely to propose a court which would meet once a year, but to establish a court that would be permanently in session at The Hague in order that it might receive cases and judge them without the delay incident to the appointment and assembling of judges. Therefore, it was provided that the large court which was to meet once a year should nominate annually from its members three judges to form a special delegation and three deputies to replace them should the necessity arise. The large court, therefore, is authorized — indeed required — to appoint a judicial committee to which may be referred cases permitting summary procedure, and the delegation is likewise competent to act as a commission of inquiry. The idea of a small committee within the larger court was suggested by the Russian proposal, previously described, and the presence of this judicial committee at The Hague not merely ready but anxious to decide controversies submitted to them offers to the nations of the world a simple remedy and adequate means for the judicial settlement of any controversy susceptible of judicial settlement. Through the effort of the French delegation in 1899 article 27 of the convention for the pacific settlement of international disputes provided that strangers to a controversy might suggest to the parties in conflict to have recourse to the Permanent Court. The adoption of this convention would give practical effect to this article by providing permanent judges at The Hague to whom the parties in controversy might be referred. A reason not already mentioned for the comparatively large number of judges in the general court is that each additional judge is a guaranty of impartiality. The judicial committee consisting of three should be by its composition saved from the suspicion of partiality. Therefore, it is provided that the member of the delegation can not exercise his duties when the power which appointed him or of which he is a national is one of the parties.

To return to the court itself. Although the project provides that the court shall meet in session once a year, it was not meant that the judges of the court should go to The Hague unless the docket of the court would justify it. Therefore, it is provided that the court shall not meet in session if the delegation considers that such meeting is unnecessary; for it may be that the judicial committee is competent to transact the business and that there are no cases on the docket for the consideration of the court. Lest, however, the judicial committee should endeavor to perpetuate itself and, from selfish motives, be led to adjourn the meeting of the court, it is provided (article 14) that the court shall be convened upon the request of a power, party to a case actually pending before the court, the pleadings in which are closed or which are about to be closed. The discretion therefore lodged in the delegation is subject not merely to the supervision but to the control of the powers in litigation. It may happen, however, that a case presented to the delegation is of such fundamental importance that this smaller body does not feel justified in deciding it. Therefore, it is provided that the delegation may in case of necessity summon the court in extraordinary session. The foundation, therefore, is laid for a court which is to meet annually if the business before it justifies a session. A judicial committee is to be selected annually by the court, by ballot if in session at The Hague or by mail if not so in session. The judicial committee is permanently in session at The Hague to undertake any and all business presented to it by agreement of the powers. It is further provided in the interests of the litigants that the members of the delegation are to complete all matters submitted to them, even if the period has expired for which they have been appointed judges.

As the court thus outlined is to be the court of the contracting nations it is very necessary that its proceedings be known to the nations. Therefore, it is provided that a report of the proceedings shall be drawn up every year by the delegation and forwarded by the International Bureau to the contracting powers. In this way the proceedings of the court are forced upon the attention of the signatory powers and they are thus in a position to appreciate the importance of its labors and to exercise general control and supervision.

Passing, now, from the organization of the court let us consider its jurisdiction and procedure. The jurisdiction of the court is purposely very large, because it is hoped that it will draw to itself all controversies between nations susceptible of judicial settlement. The court should be empowered to consider all such questions submitted, but such questions will not be submitted unless the judgments of the court not only win but merit universal approval. The Court of Arbitral Justice is therefore declared competent to deal with all cases submitted to it in virtue either of a general undertaking to have recourse to arbitration, or of a special agreement. The original draft of this article was divided into three paragraphs by virtue of which the court was declared to be competent:

> (1) For all cases of arbitration which by virtue of a general treaty concluded before the ratification of this convention may be submitted to the Permanent Court of Arbitration, unless one of the parties opposes; (2) for all cases of arbitration which by virtue of a general treaty or special agreement may be brought before it; (3) [upon the proposal of Germany and the United States] for the revision of awards of tribunals of arbitration and reports of commissions of inquiry, as well as for the determination of the rights and duties which arise therefrom in all cases in which the parties apply to the court for this purpose by virtue of a general treaty or special agreement.

As a correct understanding of the exact jurisdiction of the Court of Arbitral Justice is of great importance in order to enable us to appreciate the services it might render, the following discussion of the article is taken from the official report of the conference:

> It is seen that a notable difference of opinion appears therein between the authors of the project. It is therefore not astonishing that differences of opinion should also have manifested themselves among the members of the committee.
>
> The authors of the project proposed to allow the parties the greatest freedom of choice between the two courts, and consequently declared that if an arbitration case arose by virtue of a general arbitration treaty concluded prior to the convention regarding the establishment of the proposed court it could be referred to the jurisdiction of this court unless the other party to the controversy opposed.
>
> The second paragraph gave the court competency in all arbitration cases which might be brought before it by virtue of a general treaty or a special agreement. The purpose of the third paragraph was to specify in detail the various matters in which a general treaty or a special agree-

ment would grant jurisdiction to the court, by stipulating that the award of tribunals of arbitration or the reports of commissions of inquiry might be submitted to it for revision by express consent of the parties.

As far as the reports of the commissions of inquiry are concerned, the German and United States delegations were inspired by the amendment proposed by Russia to the articles of the convention relating to commissions of inquiry. It appeared very possible that the parties in litigation might desire to submit the conclusions of the commission of inquiry to a tribunal for the purpose of having the latter determine judicially the rights and duties accruing to or devolving upon them from the facts determined by the commission of inquiry.

It must be stated, however, that the British delegation neither deemed it advisable nor necessary to provide for this eventuality. The appeal being purely voluntary on the part of the parties, it appeared that the article was uselessly specifying a right which was included among their general powers. The German and American delegations thought that by this means all misunderstanding would be avoided regarding the competency of the tribunal on the subject and that the paragraph was of real utility.

The objections made to the original wording of the article were summed up by His Excellency Mr. Fusinato. He observed that section 1 of article 16 established a presumption in favor of the new court, and was of opinion that a convention could not be modified without the consent of the parties. "It is not sufficient," he said, "to grant the parties the right to oppose each other. It would therefore be desirable to add to this paragraph the provision that it must be 'with the express consent of the parties.' However, section 1 thus modified becomes useless, for the case contemplated by it is already provided for in section 2 of the same article."

As regards section 3 of the article, Mr. Fusinato observed that the revision can generally take place only before the same judge who pronounced the sentence. The remedy referred to in section 3 would therefore not be a revision but a judgment on appeal for review or annulment. If the parties agree to have recourse to the new court under the conditions provided in section 3, they can certainly do so; but this case comes under the general provisions of section 2, and section 3 should therefore also be stricken out.

With regard to the objection made to the first paragraph of the original draft, it may suffice to say that the committee shared Mr. Fusinato's views and preferred not to create, either directly or indirectly, a presumption in favor of the new court. As was observed by Professor Renault, if the proposed court won universal confidence it must do so only by reason of its advantages and merits.

Therefore, since the competency of the court depends solely on the agreement of the parties, the distinction made in paragraphs 1 and 2 of the original draft became unnecessary, and the committee decided to strike out the first paragraph. The second paragraph, which provides for the express agreement of the parties, was unanimously retained.

However, it was proposed to suppress the qualifying word "general" which accompanied the word "treaty," while retaining beside it the expression "special agreement." Mr. Renault explained that the antithesis of the two words would indicate that in the first place the controversy could be submitted to arbitration either by virtue of the stipulations of a general arbitration treaty or by virtue of a general arbitration clause contained in a treaty, whereas the words "special agreement" would indicate an agreement between the parties for the purpose of submitting a special controversy to the court, whether they had or had not concluded a treaty in advance which obligated them so to do. He proposed the happy combination "by virtue of a stipulation to arbitrate or of an agreement to arbitrate." The committee adopted the idea, and upon its being embodied in the final draft the text read as follows:

"The Arbitral Court of Justice shall be competent in all cases which are brought before it by virtue of a general stipulation to arbitrate or of a special agreement."

The third paragraph of the original draft aroused the most lively discussion and the most serious criticism. The difficulty with regard to revision arises, as Mr. Fusinato pointed out, from the possible confusion between the term "revision," in its strict sense, and "appeal." "Revision" usually implies a new examination before the judge or court which pronounced the first decision. This is what is provided in article 55 of the convention of 1899, which permits the parties in controversy to reserve, in their agreement to arbitrate, the right to demand the revision of the award. The revision thus arises as a result of the express agreement of the parties, while their right to demand the revision arises from the fact that they have reserved it. If, however, the parties agree to grant the new court jurisdiction in the cases contemplated by paragraph 3 of the original draft, they may do so. In this case the recourse before the court arises from the "special agreement" — that is, from the express will of the parties. Regarding the matter in this light, there is no longer any reason for retaining a separate paragraph, and the committee decided to strike out paragraph 3; it was, however, understood that the "special agreement" mentioned in paragraph 2 might provide for revision by the Arbitral Court of Justice.

The purpose of the original draft was to invest the Court of Arbitral Justice with the functions of a court of appeal, provided parties in litigation chose to make use of its services, and that there might be no misunderstanding in the matter the German-American draft clothed it specifically with this character. It was thought advisable to point out the possibility of revision, although merely stating that it might be used for such a purpose did not in any way bind the nations to use it for such. The presence, however, of the clause might suggest a resort to the court for the purposes of revision by the mere statement of the competence of the court. Its presence therefore called attention to its possibility, and by so doing exerted a slight moral pressure. The Committee of Examination, however, did not share the views of the German and American delegations as to the advisability of retaining the clause, although it was specifically admitted and stated to be the understanding of the committee that the court might be used for the purposes specified in the rejected clause by virtue of a special accord.

The judges of the court are declared competent to exercise the functions of judge in the International Prize Court, and it is not too much to hope that some day, either by the appointment of the same judges for both courts or by a reorganization, there may be one great international court of justice with a twofold division into civil and prize chambers.

Passing, now, to the delegation, it appears that this latter body is competent to settle the *compromis* referred to in article 52 of the revised convention for the pacific settlement of international disputes if the parties are agreed to leave its formulation to the court. There can be no objection to this, because the delegation does not act upon its own initiative, but solely by the agreement of the parties in interest. The fact that they are strangers to the controversy and are not affected by its failure or success makes their cooperation disinterested and therefore acceptable.

Another function of the judicial committee was the subject of much discussion at the conference, namely, the provision of article 19 of the project declaring the delegation competent to settle the *compromis* "even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of —

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse can not, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the

category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

As this clause appears in substantially the same form as article 53 of the convention for the pacific settlement of international differences, and as it has been amply considered, I do not again discuss it at length or in detail. It may be pointed out, however, that the delegation is only competent to settle the *compromis* arising under a treaty of arbitration concluded or renewed after the ratification of the convention. Its effect, then, is prospective, not retroactive, and it can only settle the *compromis* if the treaty of arbitration does not either explicitly or implicitly exclude the settlement of the *compromis* from the competence of the delegation. Nations may either frame their own *compromis* or permit its formulation by the court or its delegation. In other words, the contracting powers may exclude in express terms the competence of the delegation, or may impliedly exclude the delegation by providing another or inconsistent means of settling the *compromis*. For example, in the treaties of arbitration recently concluded by the United States it is provided that "such special agreements (*compromis*) on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof." The competence of the court or its delegation is thus specifically excluded by the United States. It should be also noted that the competence of the delegation is further limited if the other party declares that the dispute does not belong to compulsory arbitration, unless the treaty of arbitration itself confers upon the arbitration tribunal the power of deciding this preliminary question. It is difficult to see how this article, thus safeguarded, can be other than helpful to parties in litigation. If they are unwilling to intrust the court or its delegation with the formulation of the *compromis*, they may do so. If they have not excluded the competence of the court, either directly or impliedly, the fact that the court may assume jurisdiction upon demand of one of the parties to the conflict will exert no little pressure upon the unwilling party to secure a *compromis* by negotiation rather than by judicial decision. If nation could sue nation by filing with the court a complaint there would be no necessity for a *compromis.* But the competence of the court or its delegation to frame the *compromis* upon the request of one litigant when a treaty of arbitration exists between the litigants binding them to arbitrate, seems to be a long step toward introducing into the law of nations the procedure of a common-law court by which a defendant may be brought into court at the instance of a plaintiff.

Section number 2 of the article in question is intimately connected with the convention for the limitation of the use of force in the collection of contract debts. It will be recalled that the renunciation of force is conditioned upon arbitration, but it may well be that the parties in controversy agree to arbitrate but that either creditor or debtor may delay framing the *compromis.* If the *compromis* be not framed the agreement to arbitrate is worthless; if either party possesses the right to delay its framing it may never be framed and the agreement to arbitrate becomes a dead letter. In order not merely to enable but to force a party agreeing to arbitrate to formulate the *compromis,* the delegation is made competent to do so upon the demand of either party, unless the acceptance of arbitration is subject to the condition that the *compromis* should be settled in some other way. The procedure is thus wholly voluntary, for the intervention of the court or its delegation depends solely upon the parties who may directly or indirectly exclude the competence of court and delegation alike.

It has been stated that the delegation may sit as a court administering summary procedure in accordance with the convention for the pacific settlement of international disputes, and that it may exercise the functions of a commission of inquiry as created under the same convention. The commission of inquiry is not a court; it finds facts — it does not declare nor does it apply law. For this reason, with the assent of the parties concerned, the members of the delegation who have taken part in the inquiry may sit as judges if the case in dispute is submitted to the arbitration of the court or the delegation itself (article 18). If the judicial committee composed of three members be considered too small a body, each of the parties concerned in litigation may nominate a judge of the court to take part with power to vote in the examination of the case submitted, and if the delegation is acting as a commission of inquiry each party litigant may add a person chosen outside of the court. This privilege is not inconsistent with the provisions of the convention, because, as previously stated, the commission of inquiry finds facts; it does not deliver judgments. It should be clearly understood, however, that if the delegation sit as a law court none of its members can be citizens or subjects of the parties in controversy.

The intention of the framers of the project was to provide a court of broad jurisdiction, to appoint competent judges, ready and willing to take up their residence, if need be, at The Hague, and to designate a small judicial committee always in session at The Hague for the trial of cases. By permitting the delegation or its members to act as a commission or commissioners of inquiry, it was expected to enlarge the usefulness of the judges, and if the contracting powers are impressed by the impartiality and ability of the court as a whole, of its judicial committee, and of the individual judges composing the court, the court and the delegation will doubtless have cases to decide, and the individual judges may be detailed to sit on special commissions or tribunals of arbitration at the request of the nations without involving extra expense. It should be noted that the Court of Arbitral Justice is limited to the contracting powers. The Court of Arbitration of 1899 is open to nonsignatory powers if the parties agree to submit to its jurisdiction (article 26). The reason for the difference is twofold: (1) Financial, for the Court of Arbitral Justice is a court organized and supported by the contracting powers, and there seems to be no sufficient reason why these contracting powers should contribute judges for those who are unwilling to assume their share of the burden; (2) that the contracting powers did not wish to interfere with the Permanent Court of Arbitration by furnishing a tribunal free of expense to litigants.

The remaining provisions of the project concern matters of procedure and, although interesting, are not fundamental. Without going into details, it may be said that the Court of Arbitral Justice is to follow the rules of procedure of the convention for the pacific settlement of international disputes, where applicable (article 22); that the court determines what language it will itself use and what languages may be used before it (article 22); that the International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in article 63, paragraph 2, of the convention for the pacific settlement of international disputes (article 24); that the discussions are under the control of the president or vice-president, freely elected by the court (article 26); that the court considers its decisions in private and the proceedings are secret; that the decisions are reached by a majority of the judges present (article 27); that the judgment of the court must give the reasons on which it is based and contain the names of the judges taking part in it and be signed by the president and registrar (article 28); that each party pays its own costs and an equal part of the cost of the trial as in an ordinary lawsuit (article 29); that the expenses of the court, as distinct from the expenses of the parties, are borne by the contracting powers (article 31); that the court draws up its own rules of procedure, which must be communicated to the contracting powers; and that after ratification of the present convention the court shall meet as early as possible in order to elaborate these rules, elect the president and vice-president, appoint the members of the delegation (article 32); and, finally, that the court may propose modifications in the provisions of the present convention concerning procedure, but that such proposals are communicated through the Netherland Government to the contracting powers for their determination.

The foundation for a court of arbitral justice is thus laid. The organic act consisting of its organization, jurisdiction, and procedure was approved by the conference and recommended for adoption by the powers generally. But the conference was unable to devise in the short time at its disposal an acceptable plan for the appointment of judges.

The conference is, however, not to be criticised for failing to produce a satisfactory solution of the difficulty; for no acceptable solution of the problem has been yet proposed by the wit and ingenuity of man. The difficulty inherent in the problem is that states are regarded in diplomatic assemblies as equals and treated as such. The doctrine of juridical equality has been proclaimed from the days of Grotius to the present day, and doubtless has been of very great service to protect the weak against the aggression of the strong. But we can not overlook the fact that although legally equal the great masses of population within state lines possess influence which the smaller and less populous states do not have, and which in the business of life they do not claim. If there were but fifteen states in the world or if the powers of the world were willing to pick out fifteen and intrust them with the formation of the court, there would be no difficulty in finding fifteen judges adequately qualified for developing and interpreting the law of nations. But the small state is as tenacious of its right as the large state, and as the large states each wish a judge, the small states would not be content with less. The result is that we can easily form a court of forty-six judges, but, as previously stated, such a body would be a judicial assembly, not a court. It seems that a court could not be composed of more than fifteen or seventeen members without becoming unwieldly. How shall we reduce forty-six to seventeen?

Three methods, it may be said, were proposed: First, the system of rotation; second, the system of absolute and rigid equality; and, thirdly, the system of election. Of each of these in turn.

The framers of the project admitted freely the principle of the juridical equality of states, but maintained that the usage made of the court would naturally be proportioned to their population, industry, and commerce. They therefore proposed a court of seventeen judges. It was thought possible to reconcile the principle of juridical equality with the actual facts of daily life, by recognizing that each state, be it never so small, had the right to appoint a judge for the full period of the convention, namely, twelve years; but that the judges should sit for a longer or shorter period determined by the population, industry, and commerce of the appointing countries. In this way the smallest states, such as Montenegro and Luxemburg, would be entitled to appoint judges for the full period of twelve years, although they would be called upon to sit for but one year out of the twelve. Certain larger states should sit for a period of two years; others for a period of four years; one for a period of ten years; and eight — namely, Germany, Austria-Hungary, United States, France, Great Britain, Italy, Japan, and Russia — for the full period of twelve years. By this method, which it was hoped would either prove acceptable in itself or might be modified so as to meet general approval, each state represented at the conference would appoint a judge for the full period to serve by a system of rotation conditioned upon population, industry, and commerce. It was felt that the continued presence of judges from the eight states just enumerated would supply the court with a permanent nucleus of trained judges representing the different nations, the different systems of law, the different languages, and capable of guaranteeing the continuity of arbitral jurisprudence. Without entering further into details it may be said that this system of rotation was objectionable to many of the delegates represented at the conference, although it is practically identical with the system of rotation proposed and accepted for the constitution of the Court of Prize. Subtle distinctions were drawn between the two courts, it being stated that the larger nations were more likely to go to war; that their interests either as belligerents or neutrals were greater than those of the small states; that in submitting the validity of their actions to a court composed of neutrals, the larger states conferred such a benefit upon neutrals as to compensate any particular neutral for inadequate representation, and that therefore the larger states were entitled to permanent representation in the Prize Court.

This argument is certainly correct, but it involves a distinction between large and small powers based not merely upon population, industry, and commerce, but upon the naval strength of each contracting party. The most that can be said is that the smaller states were willing to be classified for purposes of claims arising out of war, but were unwilling to be classified for claims arising out of peace, which if unsettled might produce war. As this system will be described in considering the Prize Court it is unnecessary to discuss it here at greater length.

The system of absolute and rigid equality in the right as well as its exercise was proposed by Brazil, and may be summed up in the formula: as many judges as there are states. According to this system, which has been explained previously, the court would be composed of forty-six judges divided by order of the alphabet into three groups, each group to sit by rotation during a period of three years. This system was not considered by the Committee of Examination, and it was withdrawn by its proposer, Mr. Barbosa, who was not in favor of the establishment of a court of arbitral justice, for he believed that the system of arbitration adopted in 1899 was sufficient for all international needs; that a court of justice implying subordination was inconsistent with the sovereignty of nations; that a court of arbitration composed of judges of one's own choice was the only system compatible with sovereignty. He doubtless proposed this plan for the consideration of the committee in order that his attitude might not be considered as wholly negative, and to illustrate by a concrete example the kind of court consistent with the unimpaired equality of nations and the exercise of sovereignty.

The third method, based upon juridical equality of the states, both in theory and practice, was the system of election proposed by the American delegation in order to meet the objection made to the system of rotation as based upon inequality rather than upon the equality of nations. This system was remarkably clear, simple, and might well have been adopted; for it permitted each state to participate in the election and it gave to each state an equal influence in the appointment of the judges. Each state was to select a person willing to act and capable of performing judicial duties. The name of this person was to be communicated to the International Bureau, which thereupon made a list of the persons so designated by the forty-six states. The list was to be transmitted to the minister of foreign affairs of each country with the request that he check the names of fifteen persons, supposing the court was to be composed of fifteen, best qualified to constitute the court. The papers were to be returned to the International Bureau and the fifteen persons receiving the highest number of votes were to form the court for the period of twelve years. It is difficult to see wherein this system failed to satisfy the requirement of equality or sovereignty; for equality was recognized in every step in the procedure and the election itself was the exercise of sovereignty. This system of election, however, was displeasing to the larger powers, who feared the results of combination, and it was curiously unacceptable to the smaller powers, who may have felt that the election would be conducted under pressure from the larger powers.

The fate of the project trembled in the balance, because if its acceptance or rejection depended solely upon an acceptable method of constituting the court it was evident that the result of weeks and months of labor would be lost. Therefore, it was decided to accept the project as it stood, to recommend its adoption, and to defer the establishment of the court until the powers should agree upon a method of appointing the judges. A great result was thus achieved; for the conference accepted without reserve and unanimously the principle of a permanent court composed of judges representing the various juridical systems of the world and capable of insuring the continuity of arbitral jurisprudence. From the little committee room in The Hague the duty of devising an acceptable plan was transferred to the powers at large in the hope and belief that the wit and ingenuity of the foreign office would overcome a difficulty which, while formidable, is far from insuperable.

It is therefore abundantly clear, to quote the apt and measured language of the President in his recent message to Congress, that:

> Substantial progress was made towards the creation of a permanent judicial tribunal for the determination of international causes. There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The conference recommended to the signatory powers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges should be selected. This remaining unsettled question is plainly one which time and good temper will solve.

It has been stated that private arbitration was one of the first steps in the development of the judicial system of Rome, and it was suggested that the forces at work in the international world will result in the establishment of an international court, permanent in nature and judicial in composition.

The insufficiency of a temporary tribunal for the settlement of disputes between independent states united by a loose federation is shown by the experience of the United States. The importance of the problem as well as the interest of the subject to the American public amply justifies a brief exposition.

The ninth article of the Articles of Confederation provided that if the agents of the States in controversy failed to agree —

> Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination.

Omitting the controversy between New York, New Hampshire, and Massachusetts on the one hand and Vermont on the other, in which a court was petitioned but not appointed, and a controversy between Pennsylvania and Virginia, compromised and settled out of Congress, it appears the case of Pennsylvania v. Connecticut was the one case actually tried and determined by a commission appointed under article 9 of the Articles of Confederation. The controversy between the two States, arising from conflicting charters, was long and bitter and lives were lost on both sides. Connecticut claimed the Wyoming Valley, now the county of Luzerne in Pennsylvania, under its charter, whereas Pennsylvania claimed the same territory under Penn's charter. As the result of the inability to agree, Pennsylvania on November 3, 1781, prayed " a hearing in the premises, agreeably to the ninth article of the Confederation " (ratified on March 1, 1781). At a subsequent date the agents of Pennsylvania appeared before Congress, November 14, 1781, and after some delay and opposition on the part of Connecticut a court of seven persons, of whom any five could act, was agreed to, which court in session at Trenton, N. J., on December 30, 1782, rendered the following unanimous " opinion " in favor of Pennsylvania:

We are unanimously of opinion that the State of Connecticut has no right to the lands in controversy.

We are also unanimously of opinion that the jurisdiction and preemption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania.

In 1784 an attempt was made on the part of certain citizens of New Jersey to have a court appointed agreeably to the ninth article in order to settle a controversy in regard to a certain tract of land termed Indiana included in the grant of the Northwestern Territory made by Virginia on March 1, 1784, to the United States. Congress refused to grant the petition for a court and accepted the conveyance. It thus appears that although commissioners might be appointed by Congress for the settlement of controversies between the States in accordance with the provisions of the ninth article, Congress claimed and exercised its discretion either to appoint or refuse to appoint commissioners. The remedy sought to be provided by the article was thus inadequate, and proceedings under the article did not commend themselves highly to the States in controversy, for in various instances the case was compromised even although a court had been appointed for its consideration, as in the case of Massachusetts v. New York.

Massachusetts claimed jurisdiction over a tract of land between 42° 2′ N. and 44° 15′ N., extending westwardly to the Southern Ocean, which claim was denied in part by New York. Unable to agree, Massachusetts prayed "that a Federal court may be appointed by Congress to decide a dispute between the said Commonwealth and the State of New York" (June 3, 1784). The parties appeared by their agents (December 8, 1784) and were "directed to appoint, by joint consent, commissioners or judges 'to constitute a court for hearing and determining the matter in question, agreeably to the ninth of the articles of confederation and perpetual union.'"

A court of nine commissioners was agreed upon (June 9, 1785) by the agents of the litigant parties and the commissioners were notified to meet at Williamsburg, Va., on the third Tuesday of November, 1785, to hear and determine the controversy. The court, however, did not meet, as Massachusetts and New York subsequently notified Congress that the controversy was "settled and determined by an agreement entered into on the 16th day of December last [1786], by the agents of the said States."

As the case of Pennsylvania v. Connecticut is the only case in which the court of arbitration constituted by the parties "agreeably to the ninth article" rendered an "opinion," so the case of South Carolina v. Georgia offers the only instance under the Articles of Confederation of the formation of a court by alternately striking from a congressional list until the number was reduced to thirteen, as provided by the ninth article. The State of South Carolina claimed certain lands; the State of Georgia likewise claimed the territory in dispute. Unable to settle the controversy by direct negotiation, they appealed to Congress. Therefore, on June 1, 1785, Congress resolved "that the second Monday in May next be assigned for the appearance of the States of South Carolina and Georgia by their lawful agents; and that notice thereof and of the petition of the legislature of the State of South Carolina be given by the Secretary of Congress to the legislative authority of the State of Georgia." The time of appearance having been extended, the agents of each State appeared before Congress on Monday, September 4, 1786, and were directed "to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question, agreeably to the ninth article of Confederation and perpetual union." Unable to agree upon the composition of a court, upon motion of the delegates of Georgia (September 13, 1786), it was "resolved that Congress proceed to strike a court in the manner pointed out by the Confederation."

In accordance therefore with this provision three persons were named from each State and by alternate striking reduced to thirteen. Upon motion of South Carolina these names were put in a box and the following nine names were drawn out in the presence of Congress: Alexander Contee Hanson, James Madison, Robert Goldsborough, James Duane, Philemon Dickerson, John Dickinson (the author of the article), Thomas McKean, Egbert Benson, and William Pynchon. The first Monday in May, 1787, was fixed for the meeting of the court at New York. A court thus composed would have been excellent and its decision entitled to respect. There is no evidence, however, that it sat, as the case was settled by a compact between the two States.

The net result of procedure under article 9 was the trial and final determination of one case (Pennsylvania v. Connecticut); the appointment by mutual agreement of commissioners in two controversies, settled, however, out of court (Massachusetts v. New York; South Carolina v. Georgia); with petitions for the appointment of a court in some three other cases. The temporary tribunal was unsatisfactory. It was difficult to constitute, it rendered but one "opinion," and it failed to appeal either to the imagination or judgment of the public. Therefore, when the Constitutional Convention met in 1787 in Philadelphia, and it was proposed to retain the ninth article and incorporate it in the Constitution, the proposal met with no favor and was unanimously rejected. Arbitration with judges of their own choice was discarded by States as jealous of their rights in convention as any at the recent conference at The Hague, in favor of a permanent Supreme Court composed of judges acting under a sense of judicial responsibility, for the settlement of controversies which might lead to war between independent and sovereign States.[5] Arbitration which failed for thirteen States has been replaced by a judiciary which succeeds for forty-six States. Does not the experience of the United States offer at once a hope and a precedent?

James Brown Scott.

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[5] "The only question presented was whether as between the States of the Union the court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as this is not open to doubt." — Per Mr. Justice Holmes, in Missouri v. Illinois, 200 U. S. 496, 518.

For full information on the subject of judicial proceedings under the Articles of Confederation, see J. C. Bancroft Davis, in 131 U. S., pp. 1–lxii; Carson's History of the Supreme Court of the United States, I, 66–79; and a brief note in Professor Jamieson's Essays on the Constitutional History of the United States, p. 3.

# THE SECOND, THIRD, AND FOURTH VŒUX OF THE CONFERENCE

Among the formal utterances which are embodied in the final act of the Second Peace Conference at The Hague three *vœux,* or expressions of opinion, are commended to the signatory powers. Two of these relate to the commercial and industrial relations between belligerent governments and neutral residents of belligerent or occupied territory; the third has to do with the preparation of a code of laws governing maritime warfare. As finally adopted the text of the *vœux* governing neutral relations was given the following form:

> The conference expresses the opinion that, in case of war, the responsible authorities, civil as well as military, should make it their special duty to insure and safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations between the inhabitants of the belligerent states and neutral countries.
>
> The conference expresses the opinion that the powers should regulate, by special treaties, the position, as regards military charges, of foreigners residing within their territories.

The foregoing utterances represent the final action of the conference in respect to a project submitted by the imperial German delegation, which had for its object to increase, to some extent, the immunities accorded by belligerent governments to neutral residents and their property in belligerent or occupied territory. Under existing rules neutral persons are exempt from compulsory participation, as combatants, in the operations of war; but their property receives no special consideration due to the fact of its neutral ownership, and is subject to all the burdens and imposts, ordinary or extraordinary, which a belligerent may find it necessary to impose in time of war, either in his own territory or in the territory of the enemy which is in his military occupation.

It was the purpose of the German project to modify the existing rules by giving neutral property an immunity from war taxes and imposts, and by requiring prompt payment to be made for such property when taken for public use in belligerent territory, or when taken by way of requisition in territory in belligerent military occupation. These propositions were plainly calculated to relieve neutral subjects, and especially their property in the nature of stocks of goods and merchandise, from the burdens and hardships of war in which, as neutral individuals, they had neither part nor interest. The project was conceived in a humane spirit and would have operated to restrict the operations of an existing war to those chiefly concerned in its prosecution — the belligerent states and their subjects — and to accord a corresponding immunity from the incidence of its burdens in behalf of neutral property situated in belligerent or occupied territory.

As a power having a permanently neutral policy, and constantly desirous of advancing neutral interests in every proper way, the proposition was warmly supported by the United States. It also received important and powerful support from other quarters, which did not avail, however, to secure its adoption as a conventional rule in face of the opposition of some of the more important maritime powers.

The public opinion of the civilized world does not yet sufficiently realize to what a severe strain the delicate mechanism of international commerce will be exposed in future wars. The tendency of modern industry is to manufacture on a large scale, involving the accumulation of enormous stocks of manufactured products and a corresponding distribution through the instrumentality of foreign commerce. Large stocks of goods thus accumulate in the hands of distributing agents in foreign countries, who are themselves neutral in a majority of cases, and whose property is neutral property. An immediate result of the confiscation of these goods by a belligerent in time of war, either by way of war imposts or by means of requisitions in occupied territory, will be to seriously diminish the resources and disturb the credit of their neutral residents. How slight a disturbance is necessary to bring on an international panic is only too well known in the money centers of the world. It was to eliminate this as a disturbing factor in the world-wide economic and business relations which now prevail that the proposition was advanced by Germany and advocated by the United States. The weak and nerveless result is embodied in the foregoing expressions of opinion. That belligerents will voluntarily, and in the absence of obligatory treaty stipulation, diminish the burdens to which neutral residents and their property are now subject transcends belief. It can only be said that an opportunity presented itself to the conference to modify the severity of the rules governing the relations between belligerent states and their neutral residents, in such a way as to contribute materially to the security of the general commercial and business interests of the world at a time when they are subjected to a great and dangerous tension. It is greatly to be regretted that the opportunity was not more fully taken advantage of.

The final expression of desire to which the conference gave utterance in its final act is embodied in the following *vœux:*

> The conference expresses the opinion that the preparation of regulations relative to the laws and customs of naval war should figure in the program of the next conference, and that in any case the powers may apply, as far as possible, to war by sea the principles of the convention relative to the laws and customs of war on land.

There has been a substantial consensus of opinion, since the adoption of the rules of war on land in 1899, that the rules formulated with such painstaking care had their chief, if not their sole, application to the operations of war on *terra firma*. It has been generally conceded that if naval forces act on shore, either independently or in cooperation with land armies, their undertakings must be governed by the international rules of 1899 and 1907. But that operations, confessedly naval in character and carried on by ships and fleets, are governed by those rules has not been conceded. The private property of an enemy on land, for example, may only be taken by way of requisition, and that which is not taken must be protected. At sea it is admittedly liable to capture, save as protected by the rules of the Declaration of Paris. The incidents of battles, sieges, and bombardments on land are subject to the operation of well-defined rules, none of which apply to the corresponding operations of naval warfare, and the general fear that coast cities might be made the subject of ransom, under a threat of bombardment, has been sufficient to secure the adoption of conventional stipulations expressly forbidding it.

Considerable difficulty will be encountered in the preparation of such a set of rules, as there is some uncertainty of opinion as to whether they should include not merely the operations of hostile fleets and ships, but rules governing the rights of search and capture at sea, together with the establishment and maintenance of naval blockades. It should also be remembered that naval hostilities are, in some of their important aspects, so entirely different from corresponding undertakings on land as to give occasion for special rules for their regulation and government. There is no noncombatant population to be protected, there are no villages or habitations in which naval forces may be quartered, and the high seas can not be made the subject of belligerent occupation. On the other hand, neutral property which is contraband of war, or is engaged in an attempt to violate a blockade, is unquestionably liable to capture and confiscation. But there *are* rules of war at sea, which are generally known and applied by belligerents in the conduct of their naval operations; it is also generally conceded that they are simpler and less numerous and technical than those regulating military operations on land, but it is difficult to formulate them in the present shifting conditions of naval warfare, and they touch certain large subjects — contraband, blockade, the right of search, and neutral trade with belligerent fleets and armies, as to which conflicting national interests make it difficult, if not impossible, to enable an agreement to be reached at the present time.

The conference, in the agreements which it was able to reach on maritime subjects, went as far in the direction of humanity and consideration for neutral interests as is warranted by the present state of international public opinion. To have attempted more would have menaced the results which had already been made the subject of tentative agreement or of conventional stipulation.

GEORGE B. DAVIS.

# RECOMMENDATION FOR A THIRD PEACE CONFERENCE AT THE HAGUE

The First Conference of 1899 was an experiment for which there were precedents, although there was perhaps no single precedent like it in all respects. Congresses or conferences have been familiar since the Congress of Westphalia, which may be said to mark the conscious beginning of modern international relations, and at various times conferences or congresses have been called, usually at the end of war, to settle the terms of peace. Familiar examples of peace conferences, in the sense that they were assembled to establish peace, are Westphalia, 1648; Utrecht, 1713–14; Vienna, 1814–15; Paris, 1856; and Berlin, 1878. Each one of these conferences, to use a single expression, for congress and conference are practically synonymous, was preceded by a war and owed its existence to war, although its purpose was not to devise means for establishing peace in general, but to conclude a special peace by adjusting the controversy out of which the war sprang. In some of the later conferences — notably the Congress of Paris in 1856 — questions of a general nature were discussed and an agreement reached upon questions of maritime law, but the codification of maritime warfare begun by the Congress of Paris was incidental to its calling. The fact, however, that the congress succeeded in abolishing privateering, in requiring that blockades be binding to be effective, that the neutral flag covers enemy's goods, and that neutral goods are safe in enemy bottoms furnished a precedent for a conference which should deal with matters of a general interest even although its labors should be restricted to a small portion of international law. The usefulness of the conference was thus demonstrated, and in recent times conferences have been called with no war immediately preceding their call, although such conferences have dealt with disputes arising out of war or have sought to prevent disputes by settling in advance usages and customs of war. Thus, the Geneva Conference of 1864 called by Switzerland to consider the treatment of sick and wounded upon the battlefield was not preceded by war in the sense that its mission was to end hostilities, although the neglect of the sick and wounded at Solferino in the war of 1859 between France and Austria prompted the call. In the same way the Geneva Conference of 1868 was not a war conference, although its convocation was due to the needless loss of life in the naval battle of Lissa between Italy and Austria in 1866. The conference sought to extend to naval war the beneficent principles of the Geneva Convention of 1864 concerning the sick and wounded in war on land.

The conference called by Alexander II and which formulated the Declaration of St. Petersburg of 1868 was not immediately preceded by a war, although its results were limited to the restriction of the means of destruction in future warfare. In like manner the Brussels Conference of 1874 was not convoked by belligerents or by powers on behalf of belligerents, although the Franco-German war of 1870 was undoubtedly the cause for its convocation.

This second group of conferences may be called peace conferences in that they met in times of peace, but the program dealt exclusively with the usages and customs of war.

A third type is the conference meeting in time of peace to consider the means whereby peace may be preserved, and of this class the Congo Conference of 1884–85 at Berlin and the Pan-American Conference of 1889–90 at Washington are familiar illustrations. The Berlin Conference dealt with the Congo question, and by regulating traffic upon the Congo and its tributaries, by establishing boundaries of the states claiming territory in the neighborhood of the Congo and adopting rules for the occupation of Africa, removed a fertile source of conflict. The Conference of Berlin was not preceded by a war, nor was it followed by one; it was, in the highest sense of the word, preventive. The Pan-American Conference of 1889–90, due to the initiative of Mr. James G. Blaine, was assembled in the interest of peace. Its purpose was to draw the American states closer together and, by means of arbitration, to provide a substitute for war.

It is thus seen that the idea of an international conference was familiar both to the old and the new world, and that the Peace Conference of 1899 was but the culmination of, rather than the first step in, the development. The war conference showed not only that peace might be established by a meeting of the powers, but also that matters of general interest might be discussed and regulated at such a conference in addition to the questions at issue betwen belligerents. The second class furnished a precedent for a conference called in time of peace to regulate the laws and customs of warfare, whereas the third class demonstrated the usefulness of a conference to discuss and regulate questions disconnected from war or only remotely connected with it. The First Hague Conference furnished the priceless precedent of a conference meeting in time of profound peace to discuss not merely questions of armament and the laws and customs of war, but at one and the same time the means whereby conflicts between states might be settled by a resort, not to arms, but to good offices, mediation, and arbitration.

The First Conference was therefore rather a development than an experiment, although if the labors of the conference had failed to justify its call it is doubtful whether a second conference would have met in the near future. The success, however, of the experiment seems to have made the conference an institution, and the action of the Second Conference in providing for a successor leads to the hope that conferences will assemble in response to an enlightened and insistent public opinion. The First Conference looked forward to a successor; the Second Conference provided a time within which its successor should meet. The president of the First Conference, M. de Staal, is reported by Dr. Andrew D. White, in his interesting autobiography, to have considered a call for a second conference as probable within a year from the adjournment of the first,[1] but the war in South Africa between Great Britain and the Transvaal and the Russo-Japanese war of 1904 postponed the call. At the request of the Interparliamentary Union, held at St. Louis in 1904, President Roosevelt sounded the powers as to their willingness to attend a conference, and the conclusion of the Russo-Japanese war, brought about by the mediation of President Roosevelt, enabled Russia to assume the initiative for a second conference, which assembled at The Hague on the 15th day of June, 1907, and adjourned on October 18 of the same year.

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[1] "A delegate also informed me that in talking with M. de Staal the latter declared that in his opinion the present conference is only the first of a series, and that it is quite likely that another will be held next winter or next spring." Autobiography of Andrew D. White, II, 272.

That the First Conference had in mind a successor is evidenced by the fact that it expressed "the wish that the questions of the rights and duties of neutrals may be inserted in the program of a conference in the near future;" that the "proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration;" and that the "proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration." It will be noted that the First Conference did not indicate any date at which the future conference should assemble, whereas the Second Conference, in addition to providing subjects for the program of the Third Conference, specified that it should meet in or about the year 1915. The conference, however, did not attempt to perpetuate itself by declaring that conferences should be held in the future at regular and recurring intervals, but limited itself to a recommendation for a third conference to meet at a specified date. It might have gone further and stated that the periodic assembling of a conference commended itself to its judgment, but as the conference was not a legislative body, and if it had been could not have bound its successor, much less the sovereign states represented at the conference, it wisely limited itself to a recommendation that a third conference should be held. Public opinion in the United States was outspoken for a stated, periodic conference, and the American delegation was instructed by the Secretary of State to favor the holding of further conferences within fixed periods, in the following cautious and measured language:

> You should keep always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on; and you should regard the work of the Second Conference, not merely with reference to the definite results to be reached in that conference, but also with reference to the foundations which may be laid for further results in future conferences.

It may well be that among the most valuable services rendered to civilization by this Second Conference will be found the progress made in matters upon which the delegates reach no definite agreement.

With this view, you will favor the adoption of a resolution by the conference providing for the holding of further conferences within fixed periods and arranging the machinery by which such conferences may be called and the terms of the program may be arranged, without awaiting any new and specific initiative on the part of the powers or any one of them.

Encouragement for such a course is to be found in the successful working of a similar arrangement for international conferences of the American republics. The Second American Conference, held in Mexico in 1901–2, adopted a resolution providing that a third conference should meet within five years and committed the time and place and the program and necessary details to the Department of State and representatives of the American states in Washington. Under this authority the Third Conference was called and held in Rio de Janeiro in the summer of 1906 and accomplished results of substantial value. That conference adopted the following resolution:

"The Governing Board of the International Bureau of American Republics (composed of the same official representatives in Washington) is authorized to designate the place at which the Fourth International Conference shall meet, which meeting shall be within the next five years; to provide for the drafting of the program and regulations and to take into consideration all other necessary details; and to set another date in case the meeting of the said conference can not take place within the prescribed limit of time."

There is no apparent reason to doubt that a similar arrangement for successive general international conferences of all the civilized powers would prove as practicable and as useful as in the case of the twenty-one American states.

Pursuant to these instructions the American delegation succeeded, by means of great tact and conciliation, in persuading M. de Nelidow, first Russian delegate and president of the conference, to introduce of his own motion the following recommendation, which was unanimously adopted:

Finally, the conference recommends to the powers the assembly of a third peace conference, which might be held within a period corresponding to that which has elapsed since the preceding conference, at a date to be fixed by common agreement between the powers, and it calls their attention to the necessity of preparing the program of this Third Conference a sufficient time in advance to insure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the conference considers that it would

> be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the governments with the task of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the conference itself.

A careful reading of the recommendation shows that the conference is to be held " within a period corresponding to that which has elapsed since the preceding conference " — that is to say, within a period of eight years; that the date is to be fixed " by common agreement between the powers," and that the program of this Third Conference is to be prepared " a sufficient time in advance to insure its deliberations being conducted with the necessary authority and expedition." The powers were willing to recommend a third conference, but they were not willing to specify the exact date. They felt it, however, to be essential that the program should be prepared in advance and communicated to the participants in ample time to enable them to mature their views and to present them in finished form at the opening of the Third Conference. Without reflecting upon any power or group of powers the conference felt that much time was lost by a failure to present at the opening the various projects for which consideration was requested and that the delay involved in communicating with the home governments was a waste of time for which there was neither a reason nor a compensating advantage.

The Second Conference felt that no one power should be burdened " with the task of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program " which should include the proposals collected and ripe for submission. For this purpose a preparatory committee was to be appointed by agreement of the various governments " some two years before the probable date of the meeting " in the belief that the tentative program might be examined, approved, disapproved, or modified by the various powers within a period of two years. But a great step in advance was taken by the conference in providing that "this committee should further be intrusted with the task of providing a system of organization and procedure for the conference itself," the obvious meaning of which is that the committee is to propose a system of organization and procedure for the conference which will meet the approval of the invited and participating powers, so that the future conferences will no longer be officered and dominated by any one power. The conference of 1899 was due to the enlightened statesmanship of Nicholas II; and it was in no uncertain degree his conference, for the first delegate of Russia was president and the presidents of the various commissions were chosen directly or indirectly by Russia. The Second Conference was not so directly the work of the Czar, for it was, as stated in the very first lines of the final act, "proposed in the first instance by the President of the United States of America," but the president of the conference was the first delegate of Russia, and the officers of the second, like the officers of the first, were chosen by Russia and notified to the Second Conference for approval. The Third Conference is, however, to have its "organization and procedure" designated in advance by a committee, which shall represent not merely one power but the community of nations. The conference, therefore, is to be international not merely in name but in fact, and its organization and procedure are to be the result of the wit and wisdom of the many, not of an individual power, whether it be the august initiator of the conference itself or of the individual who happens to propose its calling. In becoming an institution the child has outgrown tutelage.

Is the conference the first step to a confederation — that is to say, a political union of the states with legislative and executive powers — or is it an institution composed of the diplomatic representatives of the various countries with the power to legislate *ad referendum?* In other words, is it based upon the idea of amalgamation with a representative parliament, or is it a diplomatic assembly with powers to recommend legislation to states which upon adoption by the states becomes binding upon them and thus international law? The dreamers have proposed confederation; the man of affairs, on the contrary, may well regard a federation as a sacrifice of local independence, much in the way that our thirteen States were unwilling to merge their individuality completely in a union. The outcome would seem to be an assembly of states composed of diplomatic representatives in which the nations remain equal and independent but consent on behalf of the community at large to renounce certain extreme national prerogatives. It may be, however, that this diplomatic assembly is in no small measure a legislature *ad referendum*; that the prize court and the proposed court of arbitral justice are the beginnings of an international judiciary, and that a committee, whether nominated at the conclusion of the conference or in advance of a conference, may be regarded as the germ of an executive.[2]

JAMES BROWN SCOTT.

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[2] For the various projects of federation, see Kamarowsky's "Tribunal International," French translation, by Westman (Paris, 1887), pp. 233–263.

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# EDITORIAL COMMENT

## TREATIES OF ARBITRATION SINCE THE FIRST HAGUE CONFERENCE

Readers of Mr. Holl's excellent volume on the Peace Conference at The Hague will recall that the First Conference attempted to frame and secure the adoption of a treaty of arbitration by which the nations bound themselves to arbitrate a carefully selected list of subjects. It is well known that this attempt failed, owing to the opposition of Germany. As a compromise article 19 of the convention for the peaceful adjustment of international differences was adopted:

> Independently of existing general or special treaties imposing the obligation to have recourse to arbitration on the part of any of the signatory powers, these powers reserve to themselves the right to conclude, either before the ratification of the present convention or subsequent to that date, new agreements, general or special, with a view of extending the obligation to submit controversies to arbitration to all cases which they consider suitable for such submission. [Reenacted in 1907 as article 40.]

The article did not seem at the time to be of any special importance and it was generally looked upon as useless because independent and sovereign states possess the right without special reservation to conclude arbitration agreements, general or special, without being specifically empowered to do so. The fact is, however, that this article, insignificant and useless as it may seem, marks, one may almost say, an era in the history of arbitration. The existence of the article has called attention to the subject of arbitration and by reference to it many states have negotiated arbitration treaties. It is true that there is no legal obligation created by the article and it is difficult to find a moral one, for it is not declared to be the duty of any state to conclude arbitration treaties. The moral effect of the article has, however, been great and salutary, and the existence of numerous arbitration treaties based upon the reservation contained in the article show the attention and respect which nations pay to the various provisions of the Hague Conference.

The following enumeration of the treaties concluded since the First Hague Conference and an analysis of the *compromis* clauses will therefore be of no little interest — perhaps of considerable value:

Argentine–Bolivia, February 3, 1902.
Argentine–Brazil, September 7, 1905.
Argentine–Chile, May 28, 1902.
Argentine–Paraguay, November 6, 1899.
(3)[1] Austria-Hungary–Great Britain, January 11, 1905.
(3) Austria-Hungary–Switzerland, December 3, 1904.
(1) Belgium–Denmark, April 26, 1905.
(1) Belgium–Greece, May 2, 1905.
(1) Belgium–Norway and Sweden, November 30, 1904.
(1) Belgium–Roumania, May 27, 1905.
(1) Belgium–Russia, October 30, 1904.
(1) Belgium–Spain, January 23, 1905.
(1) Belgium–Switzerland, November 15, 1904.
Bolivia–Peru, November 21, 1901.
(5) Bolivia–Spain, February 17, 1902.
Colombia–Peru, September 12, 1905.
(5) Colombia–Spain, December 17, 1902.
(3) Denmark–France, September 15, 1905.
(3) Denmark–Great Britain, October 25, 1905.
(2) Denmark–Italy, December 16, 1905.

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[1] The figures in parentheses refer to the numbered paragraphs following the list of treaties. These paragraphs describe briefly the nature of the reference clauses.

(2) Denmark–Netherlands, February 12, 1904.
(1) Denmark–Russia, March 1, 1905.
(1) Denmark–Spain, December 1, 1905.
(3) France–Great Britain, October 14, 1903.
(3) France–Italy, December 26, 1903.
(3) France–Netherlands, April 6, 1904.
(3) France–Norway and Sweden, July 9, 1904.
(3) France–Spain, February 26, 1904.
(3) France–Sweden and Norway, July 9, 1904.
(3) France–Switzerland, December 14, 1904.
(3) France–United States, February 10, 1908.
(3) Germany–Great Britain, July 12, 1904.
(3) Great Britain–Italy, February 1, 1904.
(3) Great Britain–Netherlands, February 15, 1905.
(3) Great Britain–Norway and Sweden, August 11, 1904.
(3) Great Britain–Portugal, November 16, 1904.
(3) Great Britain–Spain, February 27, 1904.
(3) Great Britain–Switzerland, November 16, 1904.
(3) Great Britain–United States, April 4, 1908.
(8) Guatemala–Spain, February 28, 1902.
(6) Honduras–Spain, May 13, 1905.
(6) International, January 29, 1902.
(7) International, January 30, 1902.
Italy–Argentine, September 18, 1907.
Italy–Mexico, October 16, 1907.
Italy–Peru, April 18, 1905.
Italy–Portugal, May 11, 1905.
(3) Italy–Switzerland, November 23, 1904.
(8) Mexico–Spain, January 11, 1902.
(3) Mexico–United States, March 24, 1908.
Netherlands–Portugal, October 1, 1904.
(1) Norway–Sweden, October 26, 1905.
(3) Norway–United States, April 4, 1908.
(1) Norway and Sweden–Russia, December 9, 1904.
Norway and Sweden–Spain, January 23, 1905.
(1) Norway and Sweden–Switzerland, December 17, 1904.
(4) Portugal–Spain, May 31, 1904.
(3) Portugal–Austria-Hungary, February 13, 1906.
(10) Portugal–Denmark, March 20, 1907.

(3) Portugal–France, June 29, 1906.
(3) Portugal–Great Britain, November 16, 1904.
(3) Portugal–Italy, May 11, 1905.
(9) Portugal–Netherlands, October 1, 1904.
(3) Portugal–Norway and Sweden, May 6, 1905.
(4) Portugal–Spain, May 31, 1904.
(3) Portugal–Switzerland, August 18, 1905.
(1) Russia–Norway and Sweden, November 26, 1904.
(3) Spain–Switzerland, May 14, 1907.
(3) Spain–United States, April 20, 1908.
(5) Spain–Uruguay, January 28, 1902.
(3) United States–Denmark, May 18, 1908.
(3) United States–Italy, March 28, 1908.
(3) United States–Japan, May 5, 1908.
(3) United States–Netherlands, May 2, 1908.
(3) United States–Portugal, April 6, 1908.
(3) United States–Sweden, May 2, 1908.
(3) United States–Switzerland, February 29, 1908.

### *Notes.*

(1) The article of reference in these treaties is substantially similar to the article in the treaty between Belgium and Russia, which reads as follows:

> ARTICLE 1. The high contracting parties agree to submit to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, the differences which may arise between them in the cases enumerated in article 3, in so far as they affect neither the independence, the honor, the vital interests, nor the exercise of sovereignty of the contracting countries, and provided it has been impossible to obtain an amicable solution by means of direct diplomatic negotiations or by any other method of conciliation.

Article 3, referred to in the above quotation, reads as follows:

> Arbitration shall be obligatory between the high contracting parties in the following cases:
>
> 1. In case of disputes concerning the application or interpretation of any convention concluded or to be concluded between the high contracting parties and relating—
>
> (a) To matters of international private law;
> (b) To the management of companies;
> (c) To matters of procedure, either civil or criminal, and to extradition.
>
> 2. In case of disputes concerning pecuniary claims based on damages, when the principle of indemnity has been recognized by the parties.

Differences which may arise with regard to the interpretation or application of a convention concluded or to be concluded between the high contracting parties and in which third powers have participated or to which they have adhered shall be excluded from settlement by arbitration.

The treaty between Norway and Sweden, included among those to which Note 1 refers, differs from the others in that questions as to whether disputes involve the vital interests of either country are to be submitted to the Hague Court instead of being decided by each nation for itself.

In the treaty between Russia and Norway and Sweden, November 26, 1904, no reference is made in article 1 to article 3, although the latter article appears in practically the same form as here given, except that the final paragraph is missing.

(2) The reference clause in these treaties is substantially similar to the article in the treaty between Denmark and Italy, which reads as follows:

ARTICLE PREMIER. Les Hautes Parties contractantes s'engagent à soumettre à la Cour permanente d'arbitrage, établie à La Haye par La Convention du 29 juillet 1899, tous les différends de n'importe quelle nature qui viendraient à s'élever entre Elles et qui n'auraient pu être résolus par les voies diplomatiques, et cela même dans le cas où ces différends auraient, leur origine dans des faits antérieurs à la conclusion de la présente Convention.

(3) The reference clause in these treaties is similar, substantially, to that contained in the treaty between France and Great Britain, which reads as follows:

ARTICLE 1. Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th July, 1899; provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

In the treaty between Mexico and the United States, March 24, 1908, the following clause is inserted after the word diplomacy in the above reference paragraph: "in case no other arbitration should have been agreed upon."

The treaty between Portugal and France, June 29, 1906, requires that the causes of the arbitration shall arise after the date of the treaty.

(4) The reference clause is as follows:

ARTICLE 1. All questions of a judicial character relative to the interpretation of treaties or conventions existing, or hereafter to exist, between Portugal and Spain, bordering and friendly nations, and which questions can not be amicably solved by diplomacy, shall be submitted to a commission, constituted expressly for that purpose, by previous agreement; and in the event of the parties failing to agree upon the constitution of such commission within a term not to exceed one month from the time such commission is proposed by one of the high contracting parties, then the submission shall be to the Permanent Arbitration Tribunal or court instituted at The Hague by virtue of the convention there held on the 29th of June, 1899, provided that the questions so referred and submitted shall not involve matters of vital effect upon the independence or honor of the contracting nations or the interests of other states.

(5) The reference clause is similar to article 3 of the treaty between Spain and Uruguay, which reads as follows:

ARTICLE 3. Pour le jugement des questions qui, en exécution de la présente convention, seront soumises à un arbitrage, les fonctions d'arbitre seront confiées, de préférence, à un chef d'Etat, d'une des Républiques hispano-américaines ou à un tribunal composé de juges et experts espagnols, uruguayens ou hispano-américaines.

A défaut d'entente sur le choix des arbitres, les Hautes Parties signataires se soumettront au Tribunal international permanent d'arbitrage, établi conformément aux résolutions de la Conférence de la Haye, de 1899, et, dans ce cas, comme dans le cas précédent, elles se conformeront, à la procédure arbitrale spécifiée auchapitre III des dites résolutions.

Article I of this treaty reads as follows:

ARTICLE PREMIER. Les Hautes Parties contractantes s'obligent à soumettre a un jugement arbitral toutes les difficultés, de quelque nature qu'elles soient, qui, pour une cause quelconque, viendraient à surgir entre elles, sauf le cas ou ces difficultes porteraient atteinte aux dispositions de la constitution de l'un or l'autre pays, et à l'exception de calles qui peuvent etre résolus par des negociations directes.

(6) Conference of 1902. Treaty of obligatory arbitration between Argentine Republic, Bolivia, Dominican Republic, Guatemala, Mexico, Paraguay, Peru, Salvador, and Uruguay. January 29, 1902. (To Hague if agreeable. All disputes except those affecting national honor or independence.)

(7) Conference of 1902. Treaty for arbitration of pecuniary claims between the United States of America, Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay. (This provides for reference to The Hague of pecuniary claims.)

(8) The reference clause in the treaty between Guatemala and Spain is substantially similar to that in the treaty between Mexico and Spain, which reads as follows:

> ARTICLE 3. For the decision of questions which, in accordance with this treaty, may be submitted to arbitration, the functions of arbitrator shall be conferred with preference upon a chief of state of one of the Spanish-American republics, or upon a tribunal formed of Mexican, Spanish, or Spanish-American judges and experts.
>
> In the case of not agreeing in the appointment of arbitrators the high contracting parties shall submit themselves to the Permanent International Tribunal of Arbitration established in accordance with the resolutions of the Hague Conference of 1899 with adherence in the latter, and in the former case to the arbitral procedure specified in Chapter III of the said resolutions.

Articles 1 and 2 of this treaty read as follows:

> ARTICLE 1. The high contracting parties agree to submit to the decision of arbitrators all controversies which may arise between them during the existence of the present treaty in which they might not have been able to reach an amicable solution by direct negotiation; provided that said controversies affect neither the national independence nor honor.
>
> ART. 2. Neither the national independence nor honor shall be considered to be compromised in the following cases:
>
> A. When treating of pecuniary damages and prejudices suffered by one of the contracting states or by its citizens because of illegal acts or omissions on the part of the other contracting state or its citizens.
>
> B. When treating of the interpretation of the treaties, agreements, and conventions relating to the protection of ownership of artistic, literary, and industrial property, as well as to that of privileges, patents of inventions, trademarks, mercantile firms, money, weights and measures, and sanitary precautions, either veterinary or to exclude phylloxera.
>
> C. When treating of the application of treaties, agreements, and conventions relating to successions, aid, and judicial correspondence.
>
> D. When treating of treaties, agreements, and conventions now in force, or which may be celebrated hereafter, with the object of putting the principles of public or private international law, either civil or penal, into practice.
>
> E. When treating of questions which relate to the interpretation or execution of treaties, agreements, and conventions of friendship, commerce, and navigation.

(9) In this treaty the contracting powers agree to submit to the Hague Tribunal all difficulties which they had agreed to arbitrate previous to the signing of the Hague convention of 1899 for the pacific settlement of international disputes.

(10) The reference articles of this treaty read as follows:

ARTICLE I

Les Hautes Parties Contractantes s'engagent à soumettre à l'arbitrage tous les différends de n'importe quelle nature qui viendraient à s'élever entre Elles et qui n'auraient pu être résolus par les voies diplomatiques. Elles s'adresseront à cet effet à la Cour permanente d'arbitrage, établie à la Haye par la Convention du 29 juillet 1899, à moins d'être convenues d'un tribunal arbitral différent.

ARTICLE IV

Il est entendu qu'à moins que la controverse ne porte sur l'application d'une convention entre les deux Etats, ou qu'il ne s'agisse d'un cas de déni de justice, l'article Ier ne sera pas applicable aux différends qui pourraient s'élever entre un ressortissant de l'une des Parties et l'autre Etat Contractant lorsque les tribunaux auront, d'après la législation de cet Etat, compétence pour juger le contestation.

Those treaties in the list which are not referred to in the foregoing notes make no reference to the Hague Tribunal.

## PROPOSED CONFERENCE FOR THE SETTLEMENT OF CERTAIN QUESTIONS OF MARITIME LAW

The Second Peace Conference at The Hague formulated a project for an international prize court upon the joint proposition of Germany, Great Britain, France, and the United States, and while the project as a whole has been viewed with favor there are not a few questions of importance which militate against the acceptance of the project and the passage of local legislation necessary to give it full effect. It is generally conceded that the establishment of an international prize court would mark a great advance in international law and procedure. For it is elementary that a party accused of an illegal seizure should not be permitted to pass in final resort upon the justness of his act. In the domain of private law the mere suggestion of the possibility of such a travesty on justice would be received with ridicule, yet international custom and usage permits the captor, in courts constituted by him and with judges appointed by him and owing to him allegiance, to determine the validity of the capture, seizure, or confiscation. The conference at The Hague, in establishing a court, opposed international to national judgment, and by composing the court primarily of neutrals, with representation, however, of belligerents, sought to test the validity of the capture by permanent and disinterested judges trained in the law. The advantages and supposed objections to the institution of an international prize court have been fully set forth in the leading articles in this number. The present editorial comment will deal with one article of the proposed convention — namely, the seventh — which has given rise to much comment and no little criticism, and to consider which Great Britain has summoned a conference of representatives of the maritime powers to meet in London in October, 1908.

Article 7 is as follows:

> If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.
>
> In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.
>
> The above provisions apply equally to questions relating to the order and mode of proof.
>
> If, in accordance with article 3 (2) (*c*), the ground of appeal is the violation of an enactment issued by the belligerent captor, the court will enforce the enactment.
>
> The court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

Such is the text of the article as voted by the Hague Conference after a careful explanation of its meaning and probable consequences contained in the admirable report of Mr. Louis Renault. The material portion of Mr. Renault's report follows:

> What rules of law will the new prize court apply?
>
> This is a question of the greatest importance, the delicacy and gravity of which can not be overlooked. It has often claimed the attention of those who have thought of the establishment of an international jurisdiction on the subject we are considering.
>
> If the laws of maritime warfare were codified, it would be easy to say that the International Prize Court, the same as the national courts, should apply international law. It would be a regular function of the international court to revise the decisions of the national courts which had wrongly applied or interpreted the international law. The international courts and the national courts would decide in accordance with the same rules, which it would be supposed ought merely to be interpreted more authoritatively and impartially by the former courts than by the latter. But this is far from being the case. On many points, and some of them very important ones, the laws on maritime warfare are still uncertain, and each nation formulates them according to its ideas and interests. In spite of the efforts made at the present conference to diminish these uncertainties, one can not help realizing that many will continue to exist. A serious difficulty at once arises here.

It goes without saying that where there are rules established by treaty, whether they are general or are at least common to the nations concerned in the capture (the captor nation and the nation to which the vessel or cargo seized belongs), the international court will have to conform to these rules. Even in the absence of a formal treaty, there may be a recognized customary rule which passes as a tacit expression of the will of the nations. But what will happen if the positive law, written or customary, is silent? There appears to be no doubt that the solution dictated by the strict principles of legal reasoning should prevail. Wherever the positive law has not expressed itself, each belligerent has a right to make his own regulations, and it can not be said that they are contrary to a law which does not exist. In this case, how could the decision of a national prize court be revised when it has merely applied in a regular manner the law of its country, which law is not contrary to any principle of international law? The conclusion would therefore be that in default of an international rule firmly established the international court shall apply the law of the captor.

Of course it will be easy to offer the objection that in this manner there would be a very changeable law, often very arbitrary and even conflicting, certain belligerents abusing the latitude left them by the positive law. This would be a reason for hastening the codification of the latter in order to remove the deficiencies and the uncertainties which are complained of and which bring about the difficult situation which has just been pointed out.

However, after mature reflection, we believe that we ought to propose to you a solution, bold to be sure, but calculated considerably to improve the practice of international law. "If generally recognized rules do not exist, the court shall decide *according to the general principles of justice and equity.*" It is thus called upon to *create the law* and to take into account other principles than those to which the national prize court was required to conform, whose decision is assailed by the international court. We are confident that the judges chosen by the powers will be equal to the task which is thus imposed upon them, and that they will perform it with moderation and firmness. They will interpret the rules of practice in accordance with justice without overthrowing them. A fear of their just decisions may mean the exercise of more wisdom by the belligerents and the national judges, may lead them to make a more serious and conscientious investigation, and prevent the adoption of regulations and the rendering of decisions which are too arbitrary. The judges of the international court will not be obliged to render two decisions contrary to each other by applying successively to two neutral vessels seized under the same conditions different regulations established by the two belligerents. To sum up, the situation created for the new prize court will greatly resemble the condition which has long existed in the courts of countries where the laws, chiefly customary, were still rudimentary. These courts made the law at the same time that they applied it, and their decisions constituted *precedents*, which become an important source of the law. The most essential thing is to have judges who inspire perfect confidence. If, in order to have a complete set of international laws, we were to wait until we had judges to apply it, the event would be a prospective one which even the youngest of us could hardly expect to see. A scientific society, such as the Institute of International Law, was able, by devoting twelve years to the work, to prepare a set of international regulations on maritime prizes in which the organization and the procedure of the international court have only a very limited scope. The community of civilized nations is more difficult to set on foot than an association of jurisconsults; it must be subject to other considerations or even other prejudices, the reconcilement of which is not so easy as that of legal opinions. Let us therefore agree that a court composed of eminent judges shall be intrusted with the task of supplying the deficiencies of positive law until the codification of international law regularly undertaken by the governments shall simplify their task.

The ideas which have just been set forth will be applicable with regard to the order of admission of evidence as well as to the means which may be employed in gathering it. In most countries arbitrary rules exist regarding the order of admission of evidence. To use a technical expression, Upon whom does the burden of proof rest? To be rational one would have to say that it is the captor's place to prove the legality of the seizure that is made. This is especially true in case of a violation of neutrality charged against a neutral vessel. Such a violation should not be presumed. And still the captured party is frequently required to prove the nullity of the capture, and consequently its illegality, so that in case of doubt it is the captured party (the plaintiff) who loses the suit. This is not equitable and will not be imposed upon the international court.

What has just been said regarding the order of evidence also applies to the means of gathering it, regarding which more or less arbitrary rules exist? How can the nationality, ownership, and the domicile be proven? Is it only by means of the ship's papers, or also by means of documents, produced elsewhere? We believe in allowing the court full power to decide.

Finally, in the same spirit of broad equity, the court is authorized not to take into account limitations of procedure prescribed by the laws of the belligerent captor, when it deems that the consequences thereof would be unreasonable. For instance, there may be provisions in the law which are too strict with regard to the period for making appeal or which enable a relinquishment of the claim to be too easily presumed, etc.

There is a case in which the international court necessarily applies simply the law of the captor, namely, the case in which the appeal is founded on the fact that the national court has violated a legal provision enacted by the belligerent captor. This is one of the cases in which a subject of the enemy is allowed to appeal. (Art. 3, No. 2 c, at end.)

Article 7, which has thus been commented upon, is an obvious proof of the sentiment of justice which animates the authors of the draft, as well as of the confidence which they repose in the successful operation of the institution to be created.

It will be seen that the court is vested not merely with judicial but with legislative power; that it not only interprets and develops the law, it does what the conference could not do — namely, it legislates, and establishes a code of maritime international law.

The second paragraph of article 7 provides that in the absence of treaty stipulations between the litigants the court shall apply the rules of international law, which would be an adequate provision if the rules of international law were codified. The paragraph goes on to say: "If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity." Here, however, is the crux of the question, for recognized rules of international law exist, and have long existed, on certain important matters, but they are in conflict. For example, Anglo-American jurisprudence recognizes the doctrine of continuous voyages; so do the French and Italian. The continental view generally is against the validity of continuous voyages. The rules therefore exist and are generally recognized as existing. To come to a conclusion, the court must in an appropriate case accept or reject the doctrine of continuous voyages. This means that the court not only establishes a principle from a mass of evidence, but that it chooses from among generally recognized and conflicting principles of international law that which it considers as most in accordance with the general principles of justice and equity. In a word, the court is intrusted with the high mission of codifying international law, a task which some of the nations wish to assume and complete, leaving to the court the duty of interpreting the code thus established.

The example given is merely one of many. For instance, there are involved (1) questions of contraband, penalties for its carriage, the immunity of ships from search when under convoy, and the question with regard to compensation where vessels have been seized but have been found in fact only to be carrying innocent cargoes; (2) questions of blockade, involving the locality where seizure can be effected and the notice necessary to be given before the ship be seized; (3) the doctrine of continuous voyage, which originated in the domain of contraband but has been extended during the American civil war to blockade; (4) the question of the destruction of neutral vessels prior to condemnation in a prize court; (5) the question as to neutral ships or persons rendering unneutral service; (6) the question of the conversion of merchant ships into warships upon the high seas; (7) the transfer of merchant ships from a belligerent to a neutral flag during or in contemplation of hostilities; (8) whether the domicile or nationality be adopted in determining the enemy character of property.

The fundamental nature of these problems is apparent from their mere enumeration, and the great difficulty and delicacy of their adjustment is equally obvious when it be mentioned that many of these doctrines were considered at great length in detail and with feeling at the recent Hague Conference, without an approach to general agreement. It is therefore highly desirable that a special conference should take into consideration these questions, and it seems equally desirable that this conference should be composed of the maritime powers which in the past have made and enforced the law and which must in the very nature of things develop it in the future.

Great Britain has outlined a program which contains the various subjects mentioned, and Austria-Hungary, France, Germany, Italy, Holland, Japan, Russia, Spain, and the United States of America have been invited to send representatives. The work of the conference will be watched with great interest because the fate of the prize court is understood to depend, so far as Great Britain is concerned, upon a satisfactory decision of the difficulties presented. Should the conference fail to reach definite conclusions, its work will not be lost, because the Third Peace Conference at The Hague, which is scheduled to meet in about the year 1915, will be obliged to undertake the codification of international maritime law, in order that a code of maritime law may be prepared which will be acceptable to all nations, because accepted by all. Successful or unsuccessful, the work of the London conference must be considered as a preliminary step and as such of the greatest importance.

## THE FIRST CASE BEFORE THE CENTRAL AMERICAN COURT OF JUSTICE

In the months of November and December, 1907, the Central American Peace Conference was in session at Washington, and on December 20 adjourned, after having concluded a treaty of peace and eight conventions and protocols governing the future relations of the five Central American States.[1] Among these conventions was one for the establishment of a permanent court of justice to which the five nations "bind themselves to submit all controversies or questions which might arise among them, of whatsoever nature, and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding."

In accordance with the provisions of this convention the five countries appointed their representatives on the court as follows: Costa Rica, Hon. José Astúa Aguilar; Guatemala, Hon. Angel M. Bocanegra; Salvador, Hon. Salvador Gallegos; Honduras, Hon. Alberto A. Ucles; and

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[1] Published in the Supplement of the January issue, at page 219.

Nicaragua, Hon. José Madriz. Hon. José Astúa Aguilar has been chosen president of the court, and Hon. Angel M. Bocanegra vice-president.

The formal inauguration and installation of the court took place on May 25, 1908, at Cartago, Costa Rica, and was attended with much ceremony.

An edifice for the use of the court is to be erected in the city of Cartago, for which purpose Mr. Andrew Carnegie has given the sum of $100,000.

After its inauguration, the court was almost immediately called upon to hear and settle a dispute between Honduras and Nicaragua, on the one side, and Salvador and Guatemala, on the other.

Thus, for the first time in the world's history, we see a court sitting in judgment of nations, parties litigant before it. It is not perhaps as great a step forward in settling international disputes by compulsory arbitration as was hoped for by the most enthusiastic advocates of this means of peaceful adjustment of differences between nations, but it constitutes a sure and unmistakable advance towards that goal. It is the first constituted judicial body of a permanent organization to sit in judgment of nations as our municipal tribunals do of individuals.

The first case to come to trial before it is remarkable in several respects. The court, before its jurisdiction was formally invoked by any of the Central American States, itself urged the contending nations to appear before it.

Under date of July 8, 1908, the court sent the following telegrams:

*To Their Excellencies the Presidents of Guatemala, Salvador, Honduras, and Nicaragua:*

This court has been advised, through the instrumentality of His Excellency the President of Costa Rica, of the regrettable fact that the Republic of Honduras has been invaded from the Salvadorean frontier, by revolutionaries who have already attacked one or more Honduran towns. This tribunal is also apprised of the fact that, because the character of these events creates the inference that they have not merely the significance of phenomena of the internal politics of Honduras, there has been presented a protest against the Republic of Salvador, in the name of the Government of Nicaragua — a protest that contributes in investing these events with an international character and an evident interest for the general tranquillity of the Central American people.

This court can not, certainly, exercise in any case its attributes of arbiter unless at the solicitation of an interested party; but it considers itself bound by its high mission to exhaust the resources of its friendly and well-intentioned intervention for the maintainment of peace and harmony in the five brother States; it believes that a remedy should be applied to the evil that is beginning, trusting to a collective action on the part of the Governments at once prompt and efficacious, and it has agreed, at a session held on this date, to address itself to Your Excellency, as well as to the other Chiefs of the Central American Republics, to urge its elevated sentiments of Central American fraternalism, with the end of preventing that the events, unfortunately begun in Honduras, bring on complications of international importance, for which noble end it suffices that recourse be had to this court, if the necessity has arrived, for the peaceful solution of whatever motive of disagreement there may exist, in conformity with the provisions of the first article of the convention which gave life and jurisdiction to this tribunal.

At this time any armed conflict would make Central America the object of universal censure, and, apart from the irreparable damages of a fratricidal war, would expose the nations composing it to perils of extreme gravity, which are not hidden from your illustrious mind.

The court believes that, in addressing this respectful solicitation to the Chief Magistrates, it fulfills one of its most important duties, and it does not doubt that it will be well received by the distinguished judgment of Your Excellency.

José Astúa Aguilar.
Salvador Gallegos.
Angel M. Bocanegra.
Alberto Uclés.
José Madriz.

Ernesto Martín, *Scrio.*

*His Excellency the President of the Republic of Costa Rica,*
*San José.*

With reference to the events that have lately taken place in the Republic of Honduras, mentioned in the telegram received yesterday by Your Excellency from His Excellency the President of Nicaragua, and which Your Excellency has been pleased to communicate [to] this tribunal, the Central American Court of Justice considers as a high duty of patriotism the exercise of collective action by the sister Republics for the purpose of arresting the course of those events, whose gravity and importance are not hidden from the illustrious mind of Your Excellency.

The court is of the opinion that in view of the especial position held by Costa Rica in the concert of Central America, Your Excellency is once more called to interpose your good offices between the other Governments of Central America, in order that by joint harmonious action they may proceed without delay to the peaceful solution of the unfortunate conflict now raging, or that this conflict be brought to the judicial knowledge of the court, in conformity with the convention of Washington, if the friendly exertions of the interested chancelleries should not yield satisfactory results.

The court, therefore, very respectfully requests Your Excellency to initiate the efforts toward collective action, indicated above, and has the honor to call to your attention that it has this day addressed to the Chief Magistrates of the other Republics the telegram of which a copy is inclosed.

The court takes advantage of this opportunity to manifest to Your Excellency its high consideration.

JOSÉ ASTÚA AGUILAR.
SALVADOR GALLEGOS.
ALBERTO UCLES.
ANGEL BOCANEGRA.
JOSÉ MADRIZ.

ERNESTO MARTÍN, *Scrio.*

To this the President of Salvador replied, in effect, that the best answer that could be made to the charges brought against his Government would be to quote the telegrams exchanged with it in reference to the suppression of interference, from the confines of Salvador, with the revolution at that time raging in Honduras.

Shortly thereafter formal complaints were lodged with the court by the Governments of Honduras and Nicaragua against Salvador and Guatemala. These, together with all the other pleadings and orders, were transmitted by telegraph — an innovation indeed in court procedure.

On July 13, 1908, the court issued interlocutory decrees to fix the *status quo* of the contending nations and impose upon them rules of conduct. The translations follow:

*The Cartago Court and the Central American dispute. The complaints of Honduras and Nicaragua. Resolutions of the High Court.*

CENTRAL AMERICAN COURT OF JUSTICE,
*Cartago, July 13, 1908, at 1 p. m.*

Whereas, in a formal complaint addressed to this court by His Excellency the Minister of Foreign Relations of the Republic of Honduras in a telegram sent from Tegucigalpa at 6 p. m. of the 10th instant, and delivered to the clerk's office at 5 p. m. of the following day, the Government of said Republic, after reciting the facts which warrant its action, asserts that the Governments of El Salvador and Guatemala have protected and fomented the revolutionary movement which is now astir against the constituted authorities of the nation; and it files against both the charges that they have not fulfilled "the duty imposed on them by article 17 of the treaty of peace and amity signed at Washington, to 'concentrate' and proceed against discontented Hondurans who are preparing to carry civil war into their country," and that they have violated "the neutrality which they ought to have observed in accordance with article 2 of the additional agreement annexed to the said treaty." The complaining Government adds that "Honduras declines (and charges) to the Governments of El Salvador and Guatemala the responsibility for the damage to lives and property resulting from the present armed conflict, for the unwarranted scandal it will cause before other nations, and for the breach of public faith and of the promise given to the United States and Mexican Governments at the Washington Conference;" that "it has sufficient evidence to prove the guilt of the Governments which it accuses, and places right now at the disposal of the court the documents which it possesses in this connection, to be transmitted by telegraph or sent by mail, at the discretion of the court." It asks, finally, that the court "determine at once the status in which the Governments of El Salvador and Guatemala are to remain, in order to prevent greater mischief, until the court pronounces the sentence condemning these Governments as is due."

Whereas, the complaint of the Hondurean Government should be supplemented by indicating the proofs on which it is based before it is communicated or transmitted to the Governments against which it is filed (article 14 of the convention for the establishment of a Central American court of justice).

Whereas, notwithstanding the foregoing, immediate attention should be given to the request of the high plaintiff that this court determine the status in which the contending parties are to remain during the litigation.

Therefore, in accordance with what has been said, with the provisions of the treaty cited, and with articles 1, 2, 3, 16, and 17 of the general treaty of peace and amity of December 20, 1907, as well as article 2 of the additional agreement, it is resolved:

(1) To acknowledge the presentation of the complaint of the Honduran Government (which is asked to indicate by telegraph the proofs on which it bases its complaint, without prejudice to the subsequent presentation thereof in the proper manner), and to wait until the said proofs are indicated before serving notice of the complaint on the high parties who are to answer it.

(2) In order to fix the status in which the high interested parties are to remain pending the final decision of the case, the court resolves to establish the following rules, which may be subsequently modified or supplemented, according to necessities and circumstances arising during the course of events: The Governments of El Salvador and Guatemala must (*a*) refrain from any military measure or movement, naval or land, and from all acts of whatsoever nature which might directly or indirectly imply interference in the Republic of Honduras; (*b*) confine in one place all emigrants suspected of being interested in the Honduran revolution or of being hostile toward the Honduran Government; (*c*) prevent preparations from being made, or any kind of requisites intended to help or foment the conflict from being solicited, within their territories; (*d*) rigorously prosecute any person who abets the struggle in any manner; (*e*) disarm and confine in one place any revolutionary force entering their territory; (*f*) discharge any Central American emigrants holding positions as officers in their service and compel them to reside in their respective capitals, subject to strict vigilance; (*g*) reduce their military forces to the proportion necessary for their ordinary service, plus the detachments required at suitable places along the frontiers for the sake of preventing assistance being afforded the revolutionists in the shape of men, war stores, or subsistence supplies. On its part, the Honduran Government shall refrain from any act of hostility against the aforementioned Republics. Let this resolution be communicated to the Central American Governments.

José Astúa Aguilar.
Salv. Gallegos.
Angel M. Bocanegra.
Alberto Uclés.
José Madriz.

Ernesto Martin, *Clerk*.

CENTRAL AMERICAN COURT OF JUSTICE,
*July 13, 1908—1.30 p. m.*

Whereas, His Excellency the President of the Republic of Nicaragua, in a telegram deposited at Campo de Marte on July 9 instant, at 11 p. m., and received in the clerk's office at 7 a. m. on the following day, states that his Government will file due complaint before this court on account of the revolution begun in Honduras, and that consequently His Excellency the Minister of Foreign Relations will answer the circular communication of this court under date of the 8th instant.

Whereas, His Excellency the Minister of Foreign Relations of the Republic of Nicaragua, in a telegram deposited at the Campo de Marte on July 10, at 12.30 a. m., and received in the clerk's office on the same day at 11.30 a. m., states that, by special instructions from His Excellency the President of that Republic, he has the honor to refer to the aforementioned circular, and in connection therewith he presents to the court a recital of the events which have occurred in the Republic of Honduras and declares that the Republic of Nicaragua is interested in the present contest for the reason that it participated in the Washington treaties, because it is concerned in the maintenance of general peace in Central America, because its territory borders on that of Honduras, and because of the possible participation in the conflict of Nicaraguan emigrants, who might pursue ulterior ends against its own tranquillity. The Minister of Foreign Relations enumerates, moreover, the grounds on which his Government bases its action in pointing out the Republics of El Salvador and Guatemala as the instigators in the said revolutionary movement, and he prays the court to adopt such measures as it may deem effective.

Whereas, since it did not appear clearly in the telegram of His Excellency the Minister of Foreign Relations whether it was the intention of the Nicaraguan Government to file this as its formal complaint or to reserve the complaint for a subsequent document which has been officially announced; and since it was not precisely specified whether the action should be understood as being directed solely against the Guatemalan Government, the court ordered, as shown in the appropriate document, that the clerk should ask His Excellency the Minister of Foreign Relations by telegraph for the necessary explanatory data, declaring, however, that the message mentioned was sufficiently complete to enable the court to adopt, on the strength of it, the precautionary measures referred to by article 8 of the convention for the establishment of a Central American court of justice, signed at Washington December 20, 1907.

Whereas, by virtue of the foregoing, and in the interest of the peace of Central America, it is appropriate, as one of the measures conducive to this end, to determine the *statu quo* in which the contending parties are to remain pending the final determination of their rights by judgment of the court: Therefore, in accordance with what has been said, with the above-cited provisions of the convention, and with articles 1, 2, 3, 16, and 17 of the general treaty of peace and amity of December 20, 1907, and with article 2 of its additional convention, *It is resolved:* To provide, in fixing the *statu quo*, that the high interested parties shall, pending the final decision of the matter, observe the following rules, which the court may modify or supplement, according to necessities and circumstances: (*a*) The Republic of El Salvador, Guatemala, and Nicaragua shall refrain from any act which, as regards the pending conflict in Honduras, involves violation of the neutrality agreed upon in article 2 of the aforementioned additional convention; (*b*) they shall prevent any assistance or encouragement being given in any form from their territories or with their resources to the aforementioned revolutionary movement, for which purpose they shall exercise adequate vigilance on the frontiers by means of detachments of troops stationed at the most suitable places; (*c*) they shall confine to one place all the voluntary exiles (emigrados) to whom it is possible to ascribe intentions of participating in the pending struggle or who are known to be adversaries of the Honduran Government; (*d*) they shall proceed, as provided in article 17 of the general treaty of peace and amity, against all persons who assist or encourage the aforementioned revolution within their territories; (*e*) they shall reduce the strength of their army to the proportions required for ordinary service and the aforementioned guarding of the frontiers; (*f*) they shall discharge any officers of high or low grade in their service if they are emigrants from Central American countries, compelling them to reside in their respective capitals under official surveillance; (*g*) they shall disarm and intern any revolutionary force coming into their territories; and (*h*) they shall refrain from any act in their mutual relations which might imply hostility.

Let this resolution be communicated to the Governments of Central America.

José Astúa Aguilar.
Salv. Gallegos.
Angel M. Bocanegra.
Alberto Uclés.
José Madriz.

Ernesto Martin, *Clerk of Court.*

Although there was no manifestation on the part of the Governments of Salvador and Guatemala to refuse to submit to these interlocutory decrees of the court, the President of Salvador intimated that the order was, in reality, an unnecessary one. Whatever may have been the feeling with respect to these orders of the court, the revolution in Honduras promptly subsided.

The case is still pending and the various parties litigant are engaged in preparing their proofs and arguments for submission.

Perhaps not the least important and at the same time one of the most remarkable features of this first case before the court lies in the fact that, whereas Costa Rica has, for many years, consistently declined to take any part in the various controversies of her neighbors, her representative may now be called upon to cast the deciding vote in the present suit.

Let us indulge the hope that the decision of the court may be unanimous.

## THE NEW CONSTITUTION IN TURKEY AND INTERNATIONAL LAW

On July 24, 1908, the Sultan Abdul Hamid issued an irade restoring the constitution of 1876, which had been suspended since 1877. It is not to be supposed that he did this on his own initiative, for had he desired to endow his country with the blessings of constitutional government he would neither have withdrawn the constitution nor revived it in obedience to a revolution which threatened his throne if not his life. For years the party of reform known as the "Young Turks" has insisted upon a reorganization of the government upon constitutional lines, and, taking advantage of the disaffection in Macedonia, they won over the army. As the army has been the prop of the Sultan's power by means of which he has in times past crushed opposition at home and maintained his standing abroad, its defection meant his personal and international collapse.

The revolutionary party, it seems, was bent upon three important matters: (1) The abdication of the Sultan; (2) a radical change of the present régime; (3) establishment of a representative parliament. The Sultan, wiser than many of his Christian brethren, bent before the storm, and promised the restoration of the constitution of 1876, provided he might retain his throne. The reformers seem to have exercised great moderation in the provinces, as well as in Constantinople, and by compromising with the Sultan seem to have opened the road for constitutional government. The Sultan proclaimed the constitution, and swore fealty to it. A recluse and the most unpopular man in the Ottoman Empire, he became at once a familiar figure in public, acclaimed by Moslem and Christian alike.

The constitution of 1876 provided for a parliament formed of a Senate and a Chamber of Deputies. The Senators were to be appointed by the Sultan for life, and were not to exceed one-third of the number of Deputies. According to Mr. Maynard's dispatch, dated April 7, 1877 (to be found in Foreign Relations, 1877, page 562), "the number at present is thirty-two, twenty-four Mussulmans and eight non-Mussulmans. The Deputies number one hundred and four. The president of the Deputies, appointed by the Sultan, is Ahmed Vefik Pasha, reputed to be the most learned of the Osmanlis."

In addition to a Senate to be appointed by the Sultan, the Chamber of Deputies was to be elected, and the election was held in 1877. In addition to a parliament the constitution provided for a responsible ministry, possessing the right to initiate legislation. The constitution legalized public meetings, guaranteed freedom of the press, the appointment of judges for life, compulsory education, religious liberty, and the rights and privileges ordinarily belonging to an enlightened and free government.[1]

The Parliament actually assembled March 19, 1877, in a parliament house resembling, says Mr. Maynard, "our House of Representatives," and was opened in person by the Sultan, who, in his speech from the throne, repeated his promise for social reforms and promised a reorganization of the army and navy. In his opening sentence the Sultan stated that "it is with the greatest satisfaction that I open the Parliament of my Empire, which meets to-day for the first time. You all know that the development of the greatness and strength of states, as well as of the people, depends upon justice. My Imperial Government has derived, from the beginning, its strength and influence in the world from the regard it has shown to justice, both in the administration of the state and the rights and interests of all classes of its subjects."

The Sultan pledged himself to the continuance of "justice" and promised to retain and secure the rights and interests of all classes of his subjects. He closed his address with the hope that the "Omnipotent may deign to accord success to our common endeavors."[2] As Mr. Maynard said in his dispatch already referred to, "Such a body is a great innovation upon the traditional usages of this Government. I shall watch the experiment with much interest." He did not have long to watch, for while the two Houses were discussing the Sultan's address war broke out with Russia. Martial law was proclaimed in May, and in June Parliament was adjourned. On the 13th of December the Parliament reassembled and listened to a further address of the Sultan in which he rejoiced "to open the Parliament and to meet the Deputies of the nation." And after references to the war which had broken out, and the further statement that he had not omitted "to make internal reforms, although the Government was engaged in a great war," he closed with the statement that "it is by perfect liberty of discussion that the truth can be elicited in questions of political and civil rights, and the public interest secured. This liberty has been ordained by the constitution. I think it is useless to give you further injunctions on this subject. Our relations with friendly powers are of the most cordial kind. May the Most High bless our common efforts."[3]

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[1] For details, see the constitution printed in full in the Supplement of this number of the JOURNAL.

[2] For the address in full, see Foreign Relations, 1877, pp. 563–566.

[3] For the address in full, see Foreign Relations, 1878, pp. 852–853.

The Parliament evidently took the Sultan at his word and proceeded to elicit the truth by perfect liberty of discussion, which, as the Sultan said, had been ordained by the constitution. The independence manifested was so distasteful to the new convert to constitutional government that the Parliament was "suspended" in February, 1878, and both it and the constitution, as well as the Ottoman Empire, have been in suspense ever since.

It is impossible to predict the outcome of the present experiment. The Sultan, with whom the reform party has to deal, got rid of the constitution and its Parliament in 1877, and unless the army, when its arrears are paid, remains loyal to the reformers it is not impossible that the Sultan may abolish constitution and Parliament, notwithstanding his pledged faith to the contrary, as he did just thirty years ago. Friends of constitutional liberty in all parts of the world wish the movement every success, for it is evident that the Ottoman Empire must save itself if it is to be saved, and it is equally evident that this can only be done by internal reorganization.

From an international standpoint the changes which have taken place, and which it is hoped will be permanent, do not affect the international standing of Turkey. International law is indifferent to forms of government, and while autocratic governments may prefer despotisms, and monarchs, whether they be emperors or constitutional kings, may look with that favor upon monarchies which republics extend to republics, the form of government, provided it guarantee international obligations, is left to the discretion of its subjects or citizens. The days of the French Revolution are passed, and no sovereign would seek by force of arms to restore a ruler who had lost the confidence of his people or to impose upon any member of the family of nations a particular form of government. International law stops at the threshold of each and every nation, and rightly, for it seeks solely to regulate the foreign, not the internal, relations of nations. The state is a legal entity, a political corporation, and a change in the head of the state or system of government is, legally speaking, of as little importance as the succession by constitutional means of sovereign or president, or as is the change of a chairman or president of a corporation. Such change may be internally important. For example, the election of Mr. Taft or Mr. Bryan may be a matter of grave concern to the American people, but the question of President Roosevelt's successor is one which neither concerns international law nor our foreign relations. This doctrine, elementary though it be, is the result of centuries of conflict, but it would be difficult to find a publicist of repute who would dispute its correctness in practice as well as in theory.

The doctrine has frequently been applied by the Supreme Court of the United States to the States as members of the Union, to the effect that ordinances of secession, with consequent reorganization of State governments, did not in any way affect them as States, and therefore as component parts of the American Union. (Thorington v. Smith, 1868, 8 Wall. 1; Keith v. Clark, 1878, 97 U. S. 454; *The Sapphire,* 1870, 11 Wall. 164.) In this last case it was held that a suit brought by the Emperor Napoleon III did not abate upon his deposition, but that the Republic was substituted as of right in the proceeding. The court says:

> The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning emperor, or national assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our Government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successor in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

## THE NEW JAPANESE PENAL CODE AND ITS DOCTRINE OF EXTRATERRITORIAL JURISDICTION

The Honorable Charles Sumner Lobingier, judge of the Court of First Instance of the Philippine Islands, has called the attention of the JOURNAL to this question, and as his views on the subject are likely to be of interest, the brief article is set forth in his own language without comment:

The Japanese Diet has recently enacted a new penal code. It has not (or at least had not at the time of the writer's recent visit to Japan) been formally promulgated, but that step awaits merely the passage of a new code of criminal procedure and a temporary code of that character is expected to be passed at the approaching session of the Diet.

The first modern criminal code of Japan was enacted in 1880 and promulgated in 1882, having been framed by a French jurist.[1] Since then the trend of Japanese eclecticism in legal matters has been toward German models, and the new code is of that source. Its interest to Americans, however, lies not so much in that fact as in its bearing upon international law, and particularly as to jurisdiction over offenses committed by foreigners outside of Japan.

Section 3 of the instrument provides:[2]

> This law also applies to foreigners who have committed offenses mentioned in the preceding paragraph[3] against Japanese subjects outside the Empire.

In adopting this provision Japan appears to have aligned herself definitely with a group of European nations which reject the doctrine that crime is territorial.

"There is a large number of codes," observes Professor Snow,[4] "which take jurisdiction of offenses against the state committed by them [foreigners] in foreign states; and a lesser number which go further and extend their jurisdiction to offenses against individuals. Of this number are Austria, Hungary, Italy,[5] Norway, Sweden, Russia, Greece, and Brazil, as well as Mexico."[6]

But however prevalent this doctrine may be in Continental Europe it is not the Anglo-Saxon doctrine and nowhere has the contrary been more vigorously maintained than in the United States. In the celebrated Cutting Case, which arose in 1886, the American Government stated its position clearly. Secretary Bayard, in writing to Minister Gebhard, summarized the facts and the legal principles as follows:

> On June 18 last A. K. Cutting, a citizen of the United States, who for the preceding eighteen months had been a resident, "off and on," of Paso del Norte, Mexico, and as to whose character for respectability strong evidence has been adduced, published in a newspaper of El Paso, Tex., a card commenting on certain proceedings of Emigdio Medina, a citizen of Mexico, with whom Mr. Cutting has been in controversy. For this publication Mr. Cutting was imprisoned on the 22d of June last, at El Paso del Norte, in Mexico. * * *

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[1] M. Boissonade de Fontarabie.

[2] The Criminal Code of Japan; translated from the original Japanese text by J. E. de Becker (1907).

[3] Includes homicide, assault, false imprisonment, kidnaping, libel and slander, robbery and theft, fraud and intimidation, embezzlement, etc.

[4] Cases on International Law, p. 174 n.

[5] Woolsey (International Law, sec. 76) specifically refers to Sardinia.

[6] Taylor (International Law, sec. 191) mentions also the Netherlands.

> But the paper was not published in Mexico, and the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible and is peremptorily denied by this Government. It is equivalent to asserting that Mexico can take jurisdiction over the authors of the various criticisms of Mexican business operations which appear in the newspapers of the United States. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the Government of the United States nor the governments of our several States will submit. They will each mete out due justice to all offenses committed in their respective jurisdictions. They will not permit that this prerogative shall in any degree be usurped by Mexico, nor, aside from the fact of the exclusiveness of their jurisdiction over acts done within their own boundaries, will they permit a citizen of the United States to be called to account by Mexico for acts done by him within the boundaries of the United States. On this ground, therefore, you will demand Mr. Cutting's release.[7]

The Mexican contention is thus referred to by the same functionary:

> On Saturday last, the 24th instant, I was called upon by Mr. Romero, the minister from Mexico at this capital, in relation to the case referred to.
>
> Mr. Romero produced to me the Mexican laws, article 186, whereby jurisdiction is assumed by Mexico over crimes committed against Mexicans within the United States or any other foreign country; and under this he maintained the publication of a libel in Texas was made cognizable and punishable in Mexico. And thus Mr. Cutting was assumed to be properly held.
>
> This claim of jurisdiction and lawful control by Mexico was peremptorily and positively denied by me, and the statement enunciated that the United States would not assent to or permit the existence of such extraterritorial force to be given to Mexican law, nor their own jurisdiction to be so usurped, or their own local justice to be so vicariously executed by a foreign government.
>
> In the absence of any treaty of amity between the United States and Mexico providing for the trial of the citizens of the two countries respectively, the rules of international law would forbid the assumption of such power by Mexico as is contained in the penal code, article 186, above cited. The existence of such power was and is denied by the United States.[8]

Cutting was subsequently released by the Mexican authorities, on a ground ostensibly different from that contended for by the American Government. The latter then demanded an indemnity and also asked the repeal or modification of the obnoxious article 186. Secretary Bayard, in pressing these points, declared:

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[7] Wharton, Digest of International Law, Vol. II, pp. 439–440.

[8] *Id.*, p. 441.

> This Government is still compelled to deny, what it denied on the 19th day of July, 1886, and what the Mexican Government has since executively and judicially maintained, that a citizen of the United States can be held under the rules of international law to answer in Mexico for an offense committed in the United States, simply because the object of that offense happened to be a citizen of Mexico. The Government of Mexico has endeavored to sustain this pretension on two grounds: First, that such a claim is justified by the rules of international law and the positive legislation of various countries; and, secondly, on the ground that such a claim being made in the legislation of Mexico, the question is one solely for the decision of the Mexican tribunals.

Again:

> There is no principle better settled than that the penal laws of a country have no extraterritorial force. Each may, it is true, provide for the punishment of its own citizens for acts committed by them outside of its territory; but this makes the penal law a personal statute, and while it may give rise to inconvenience and injustice in many cases, it is a matter in which no other government has the right to interfere. To say, however, that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or any other foreign country, is to assert a jurisdiction over such countries, and to impair their independence. Such is the consensus of opinion of the leading authorities on international law at the present day.[9]

It seems clear, therefore, that whatever may be the attitude of the European powers toward this article of the new code, our own Government could not concede to another the right to punish an American citizen for an alleged offense committed in our own territory.

But the provision above quoted is not the only one in the new code which fails to harmonize with settled principles of Anglo-Saxon jurisprudence. Section 5 provides:

> Even though the case may have been adjudicated upon in a foreign country *and a final and conclusive judgment rendered in respect to same,* this shall be no bar to the institution of entirely new proceedings *and the infliction of punishment for the same act* [in Japan]. If, however, the offender has already undergone the punishment to which he was sentenced in a foreign country, or any portion thereof, the court may either reduce the penalty or remit the execution thereof.

This, it will be seen, squarely conflicts with the familiar principle of double jeopardy or *autrefois acquit.* A British or American citizen once tried upon any charge is immune from further prosecution for the same offense. Could either Government concede to another a right which it

[9] Snow, Cases on International Law, pp. 173–174.

not only expressly disclaims for itself but guarantees to protect the citizens from?

Doubtless a method will be found of adjusting the difficulties which might arise from an attempt to enforce this provision, but it serves to illustrate the wide variance in the theories of criminal jurisdiction and the necessity of a clear understanding of all phases in preserving the delicate poise of international relations. Certainly, in the light of recent events, these provisions of the new Japanese penal code deserve the careful consideration of our statesmen and diplomats, and scarcely less that of all thoughtful citizens.

### POSTAL AGREEMENT WITH GREAT BRITAIN

On August 21, 1908, the following very interesting and important order (No. 1667) was issued by Postmaster-General Meyer:

> The Postal Administration of Great Britain having concurred therein:
>
> It is hereby ordered, that commencing on the 1st day of October, 1908, the postage rate applicable to letters mailed in the United States, addressed for delivery at any place in the United Kingdom of Great Britain and Ireland, shall be two (2) cents an ounce or fraction of an ounce.
>
> Letters unpaid or short paid shall be dispatched to destination, but double the deficient postage, calculated at said rate, shall be collectible of the addressees upon the delivery of the unpaid or short-paid letters.

The importance of the regulation lies in the fact that for the first time in our history Great Britain and the United States are treated for purposes of postage as one and the same country. From the 1st day of October, 1908, the rate of postage to Great Britain will thus be the same as to any point within the United States, thus abolishing for the letter writer the artificial and political distinction existing between the two great English-speaking communities.

Steam, electricity, and the telegraph have brought the nations of the earth together, and the rapid communication of ideas tends to maintain good relations by giving an opportunity to clear up or avoid misunderstanding. If industry and commerce draw nations closer together and make for peace by creating a bond strained to the breaking point by war, and if it be true, as Mr. Gladstone says, that "ships that travel between this land and that are like the shuttle of the loom that is weaving a web of concord between the nations," it follows that any governmental regulation reducing postage encourages the exchange of letters and must therefore be considered in the interest of international fellowship and peace.

It is common knowledge that the modern postal system is due to the reforms of Sir Roland Hill. The following incident, however, which led to the reform may not be so generally known. As related by Amasa Walker and Mr. Burritt, it appears that Mr. Hill was at the London post-office when a poor woman inquired for a letter. One was given to her by the clerk, and being informed that there were two or three shillings due for postage, as postage was not ordinarily prepaid, she returned it, saying that she had not the money. As she was turning to leave the office, Mr. Hill asked her from whom she expected a letter. "From my son in Australia." "I will give you the money to pay the postage," said Mr. Hill. "I thank you, sir," said the woman. "It is not necessary. It was the understanding between me and my son that he should write once a month, and if a letter comes into the office I know that he is well without being obliged to pay the postage." This led Mr. Hill to consider how great an obstruction the then existing rates of postage were upon social, moral, and business interests, as well as a temptation to dishonesty, and forthwith his influence and efforts were devoted to the reform of the system.[1]

On devoting himself to the question of postage Mr. Hill ascertained that there were three great sources of expense:

> First, "taxing" the letters, that is, ascertaining and marking the postage on each, for there were upwards of forty rates on single inland letters alone; second, the complication of accounts arising from the system, postmasters having to be debited with unpaid postage on letters transmitted to their offices and credited with their payments made in return; third, the collection of the postage on delivery. From these facts it was clear that a vast economy would be effected if prepayment, which was very rare, was made a custom. He next examined the cost of the actual conveyance and distribution of letters, and made his great discovery "that the practice of regulating the amount of postage by the distance over which an inland letter was conveyed, however plausible in appearance, had no foundation in practice, and that consequently the rates of postage should be irrespective of distance." [Dictionary of National Biography, XXVI, 418.]

The meaning of the discovery was simple. Distance within the confines of a country was practically a negligible quantity. A small uniform rate of postage might therefore be established, and by means of a stamp paid in advance the Government would be prepaid for the services it was expected to render.

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[1] Cited from Northend's Life and Labors of Elihu Burritt, p. 33, footnote.

The great apostle of peace, Elihu Burritt, sought to apply the principle to transatlantic postage, for if inland distance were immaterial it was evident that distance beyond the confines of a country might therefore be treated as uniformly negligible. Therefore, there should be a penny postage upon all foreign mail in addition to the internal rate, whatever that might be. Mr. Burritt outlined his plan in September, 1847, visited England in its behalf, addressed one hundred and fifty public meetings on the subject, from Penzance to Aberdeen and from Cork to Dublin. Hundreds of petitions were presented to Parliament in behalf of the reform, and the movement in its favor was recognized as a popular agitation. In a letter written to Mr. Burritt, dated May 31, 1847, Edward Everett said:

> Your project of a foreign penny postage is admirable. All the reasons in favor of such a postage at home apply with equal force to international postage. There is, I suppose, a vague idea that to give up the one shilling sterling on American letters would be favoring us, at the expense of the English revenue. It is very doubtful whether it would eventually prove a losing arrangement. But if it were, the saving to the individual payers of postage is, at any rate, as much for the benefit of England as of America. In favor of a foreign penny postage, there is one circumstance that does not apply to domestic mails. The great multiplication of cheap letters has increased the expense of transportation. The service is more costly. But, Mr. Cunard's shoulders are broad and strong; and you may increase the number of mail bags twenty-fold without tiring him.
>
> I hope you will meet with entire success in this excellent move of yours. I have spoken of it only as a matter of expense and accommodation to the business world; but I can scarce think of anything which would give so much new life to all international communication, and contribute so much to the formation of a *public opinion of the civilized world.*

Another friend of Mr. Burritt was the professed pacifist, Charles Sumner, who in March, 1852, introduced the following resolution into the Senate, of which he was already the ornament:

> Whereas, the inland postage on a letter for any distance within 3,000 miles is three cents when paid, and five cents if unpaid, while the ocean postage on a similar letter is twenty-four cents, being a burdensome tax amounting, often, to a prohibition of foreign correspondence, and yet letters can be carried at less cost on sea than on land;
>
> And whereas, by increasing correspondence, and also by bringing into the mails mailable matter now often clandestinely conveyed, cheap ocean postage would become self-supporting;

> And whereas, cheap ocean postage would tend to quicken commerce; to promote the intercourse of families and friends separated by the ocean; to multiply the bonds of peace and good-will among men and nations, and thus, while important to every citizen, it would become the active ally especially of the merchant, the emigrant, and the philanthropist; therefore,
>
> *Be it resolved*, That the President of the United States be requested to open negotiations with the Governments of Great Britain and France for the establishment of cheap ocean postage.

And in inclosing a copy of the resolution to Mr. Burritt, Senator Sumner said:

> It will be followed up, I trust, with success. Indeed, the intrinsic equity and humanity of the idea commend it more than speech or petition. I look with interest to your English movement. I hope you will persevere without cessation. Such a reform will be a true step on the road to universal international peace.

Mr. Burritt succeeded in influencing that other friend of peace, Mr. John Bright, in the project, who delivered an address in its favor in the House of Commons on June 26, 1852. As Senator Sumner predicted, the movement was followed up with success. Uniform regulations appeared highly desirable, and in 1862 the United States Government officially took the lead in the matter. The Department of State called attention to the many inconveniences flowing from the lack of uniformity, and suggested an international postal conference, which assembled at Paris in May and June, 1863, on which occasion fifteen states were represented. In 1874 the general postal union was established by means of which rates were reduced to what might be considered the minimum and made uniform throughout the civilized world, for at present all the civilized nations, and indeed backward nations in which communication is permitted, have adhered to the principle. The Universal Postal Union comes to the very doors of the people and shows not only the possibility but the advantage of cooperation of the nations in order to do the world's work. A recent and authoritative writer expressed forcibly this view in the pages of the Journal, from which the following quotation is made:

> That which stands out most prominently, because it touches every man's daily life, is the formation of the Universal Postal Union. This now embraces the entire civilized world and a considerable part of that which remains uncivilized. Cheapness, ease, and certainty of communication between nations have been thus secured in such a way as to increase immensely the facilities both for friendly correspondence and commercial intercourse. The congresses of

> the Universal Postal Union, meeting statedly every five years, are in effect assemblies of accredited representatives of all nations for legislative purposes. These have undoubtedly done more than any other one thing to impress the world with the idea that a world union for certain social and political ends is a practicable thing. It can no longer be sneered at as impracticable, because it exists and has existed as a working force for a whole generation. Every man who sends a letter from New York to Tokyo with quick dispatch, for a fee of only five cents, knows that he owes this privilege to an international agreement, and feels himself by virtue of it a citizen of the world.[1]

The action of the Postmaster-General is to be commended, and it is to be hoped that it will be extended to foreign countries generally, for if the postal union binds together the nations of the earth intercommunication by preventing misunderstanding smooths the path of peace.

### LONDON PEACE CONGRESS

Times have indeed changed since the year 1815, when David Lowe Dodge, of New York, with a few devoted followers, founded the first peace society of the world (the New York Peace Society) and Noah Worcester organized the Massachusetts Peace Society (December 26, 1815), nearly a year before the first society in Europe, namely, the English Peace Society, formed at London June 14, 1816. The project of the dreamer has made its way in the world, and the recent London Peace Congress, which met in July — the seventeenth in the series of peace congresses held in various lands since 1889 — was composed of delegates from two hundred and eighty societies, representing twenty-three different countries. Not only have the peace societies increased in number and influence, but royalty deigns to receive them and wish them God-speed in their self-imposed mission. The King and Queen of Great Britain, on July 27, 1908, received at Buckingham Palace a deputation of the congress, at which time and place Lord Courtney, no mean figure in the political life of his country, stated:

> One common object brings us together — the redemption of the world from the curse of international enmity and war, the promotion of legality and upright dealing between the nations, and the desire to bind the peoples of the world together in bonds of confraternity and mutual aid. We rejoice at the many signs of the acceptance of these principles in our day and at the successive efforts of the enlightened statesmen of the twentieth century to give effect to the high ideals which are common attributes of universal religion.

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[1] Simeon E. Baldwin's "International Congresses and Conferences," AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. I, pp. 567-568.

To which His Majesty replied:

> There is nothing from which I derive more sincere gratification than the knowledge that my efforts in the cause of international peace and good will have not been without fruit, and the consciousness of the generous appreciation which they have received both from my own people and from those of other countries. Rulers and statesmen can set before themselves no higher aim than the promotion of national good understanding and cordial friendship among the nations of the world. It is the surest and most direct means whereby humanity may be enabled to realize its noblest ideals, and its attainment will ever be the object of my own constant endeavors.
>
> I rejoice to think that your international organization, in which are represented all the principal civilized countries of the world, is laboring in the same field, and I pray that the blessing of God may attend your labors.

Not only was the congress received by the King, but it was officially entertained by the British Government at a banquet at the Hotel Cecil, given by the Right Honorable Léonard Harcourt on behalf of the Cabinet, and at which the Prime Minister, the Lord High Chancellor, and Ambassador Bryce were present. It is interesting to note in this connection that the expense of the banquet was defrayed from the new "International Hospitality Fund," established by the present enlightened Chancellor of the Exchequer, the Right Honorable David Lloyd-George, for the promotion of friendly relations with other countries.

At the banquet the speaker of the evening was the present Prime Minister, the Right Honorable H. H. Asquith, who, in a manly and straightforward manner, pointed out that armaments are no safeguard against war; that they "are intended to be used. They do not exist for ornament and display. They are intended to be used, and at some moment, by the sudden outburst, possibly the accidental fit of passion, they will be let loose upon the world." After calling attention to the necessity of providing for national security, he continued: "The plain fact remains that there is at this moment no enterprise in the world more worthy of the efforts and of the energies of good men than to devise some practicable means not only in minimizing the risks of an international quarrel, but in providing a rational substitute for the arbitrament of arms." The Prime Minister then pointed out the directions "in which real progress has been made and may in the future still further be made. The first is in the growth of international agreements. I say agreements, and not alliances; for alliances, offensive and defensive, are sometimes rather hindrances than helps to peace. The class of agreements to which I am referring consists of those which provide, first of all, for a healthy and business-like process of give and take for the adjustment of existing difficulties, which go on to demarcate and define spheres of influence and interest, which further promote and develop unfettered commercial intercourse and which look ahead and seek to avert in advance the possibilities of future conflict." The speaker then proceeded to "what is not less important, namely, the substitution, where differences exist—and where they can not be composed by negotiation and agreement—the substitution of what I may call international litigation for the barbarous methods of slaughter and conquest."

Mr. Asquith thereupon stated the recognized difficulties of international litigation in the following measured sentences:

> First of all, there is the preliminary difficulty of constituting a tribunal of adequate authority, which will command universal respect. There is next the serious difficulty of defining by what principle of law and procedure its decisions shall be governed. Again, a more serious difficulty still is the problem of bringing within the effective scope of its jurisdiction quarrels which seem to touch the honor and let loose the passions of a proud and independent people. And, finally—perhaps most difficult of all—you have got to find some mode of execution by which real effect can be given to its judgments. I have put these difficulties before you, but without in any way minimizing or disparaging their value, with the expressions of my own opinion that they are all of them difficuties which, with good will and honest purpose, can be overcome.

And to effectuate these laudable purposes Mr. Asquith declared:

> The main thing is that nations should get to know and to understand one another. When I say that half the quarrels arise through the want of such understanding, I am grossly understating the case. The notion that there are hereditary antagonisms which it is almost a point of honor to cherish; the notion that there are natural antipathies which must from time to time find outlet in carnage and destruction—these pernicious superstitions, for such they are, need to be eradicated from the minds not only of children, but grown men and of whole communities.

And, finally, the Prime Minister of the country which is not only the most powerful force for peace, but which has submitted more cases than any one country to arbitration, concluded:

> I am glad to say, as we all recognize, that there are many forces which are moving with us in that direction—travel; increased communication between the different peoples of the world; international trade and the spread of education, which in these days one may almost say without exaggeration has made the literature and the ideas of each nation the common property of all. Then there are the churches, to whom I ventured the other day, as a very humble layman, to address an admonition. Is there anywhere in the whole sphere of

> their activity a better or a more fruitful opportunity than here to induce them to think less of the differences which divide them and more of the simple text of the Gospel message, of which they are the bearers? But above all and beyond all, it is in the devoted and unremitting efforts of men like many of those whom I see around me to-night — idealists, and yet workers, like our lamented friend, Randal Cremer, whom we all miss to-night; it is in the devoted and patient efforts of the apostles and emissaries of peace, all cooperating in different countries to the same beneficent end, that we find the best and the strongest hope of what in my heart I believe to be the greatest of all reforms — the establishment of peace upon earth.

It will be noted that the Premier dealt in a very general way with the question of disarmament. The Chancellor of the Exchequer, the Right Honorable David Lloyd-George, in his address to the congress, devoted himself to this question, and from his admirable speech on this occasion the following paragraphs are quoted in order to show the progress of the movement inaugurated by Dodge and Worcester in this country and championed by the dreamers of dreams and the meek and humble in all parts of the world:

> It really seems incredible, when you begin to reflect upon it, that it should be necessary in the twentieth century of the Christian era to hold a meeting in a civilized country to protest against an expenditure by Christian communities of £400,000,000 a year upon preparing one nation to kill another. It is still more amazing that the leaders of opinion should be more engrossed on the perfecting and rendering more deadly of the machinery of human slaughter than upon setting up some tribunal for the peaceful adjustment of disputes.
>
> If one statesman has a dispute with another he settles it by arbitration or conference, but the moment he undertakes to settle for other people he at once resorts to the machinery of assassination. But why? Do the nations hate each other? In Germany there are a number of people who produce beet. They sell masses of it to us. Why should they kill their best customers? That is the worst way of getting on in business. We buy £10,000,000 of goods from Germany. Why should they kill us? They buy about £30,000,000 of goods from us. Well, really, when a man comes to your shop like this you don't knock him down with a cannon ball. That is not the way to increase your trade. It is time to exercise a little more common sense.
>
> And yet, while we are buying and selling peaceably, Germans to us and we to Germans, profiting by each other's trade, we are building ships and arming to fight. Why do nine-tenths of these disputes come? Nine-tenths of these disputes arise from misunderstanding of each other's motives. There are people in this country in a very exalted position and of great experience firmly under the impression that Germany means to attack us. There are people in Germany equally convinced that we are preparing to attack them. From fear of each other we are arming and rushing into the very quarrel we are afraid of. We have exactly the same state of things with France. I was very interested

to read one of the speeches of Richard Cobden delivered in 1853 at a peace meeting in Manchester. I advise you to read that speech. There is not an argument they advance about Germany now that they did not advance about France then.

There has not been a new scare invented for sixty years. The only thing that is real is the expenditure. We say, in order to secure ourselves against invasion, we must have a two-power standard navy. Look at the position of Germany. Her army is to her what our navy is to us — the sole defense against invasion. She has not a two-power standard. She may have a larger army than either of her neighbors, but any combination of them could pour in a larger number of troops. Would not we be frightened? Would not we arm? Of course we would. Germany is frightened for a reason that would have frightened us. What is wanted is a clearing up of misconceptions. It is deplorable that two great progressive communities like Germany and Britain should not be able to establish a good understanding. We have done it with France, with Russia, and the United States of America. * * *

We spend in this country every year £60,000,000 of money on preparing for war. What a stupendous waste is that! What might have been done you can each imagine for yourself in trade, commerce, in improvement in the conditions of the people, in their enlightenment, in their development, in the general alleviation of suffering, and in raising the people above the level of despair. But are not there plenty worse enemies to fight than Germany — intemperance, ignorance, vice, and that most dread of all invaders that sooner of later reaches every home? Are the dominions of death not wide enough that nations should spend £400,000,000 on extending them? There were crusades in the Middle Ages, where princes and nations dropped their feuds and abandoned their quarrels for some great purpose. There are nobler purposes awaiting princes and peoples to-day. Let them cast aside suspicion, quarrels, and feuds, and unite in redeeming humanity from the quagmire into which millions have sunk in misery and despair.

The First Hague Peace Conference unanimously adopted the resolution "that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind;" and expressed the "wish that the governments, taking into consideration the proposals made at the conference, may examine the possibility of an agreement as to the limitation by land and sea, and of war budgets." It is true that the limitation of armaments was not seriously considered at the Second Hague Conference, although the subject was kept alive by the following resolution:

> The Second Peace Conference confirms the resolution adopted by the conference of 1899 in regard to the limitation of military burdens; and in view of the fact that military burdens have considerably increased in nearly all countries since the said year, the conference declares that it is highly desirable for governments to undertake again the serious examination of this question.

The resolutions, however, have not been without effect, and the speech of the enlightened Chancellor of the Exchequer shows that the governments of the world are indeed examining the question of limitation of armaments not merely in international conferences, but in public meetings as well as in the privacy of the cabinet.

### WILLIAM RANDAL CREMER

In the recent address of the Prime Minister of Great Britain, the late William Randal Cremer was referred to as a "patient and devoted apostle of peace," whose loss he, in common with the friends of peace, deplored. It has been stated that the peace societies have grown and acquired influence in high places. It is interesting to note that a lecture on peace converted the future Sir Randal Cremer to the cause of international arbitration while a mere lad and a carpenter's apprentice.

The founder of the Interparliamentary Union was born in very humble circumstances in the year 1838, at Fareham, in Hampshire, England, where his father was a herald painter. It is stated in the London Times (July 23, 1908) that at a later period he "once told the House of Commons that his mother had only five or six shillings a week on which to keep herself, her son, and her two daughters. The two-pound loaf then cost eight pence, and every night the mother had to calculate whether it was possible for the family to have any supper, and the decision was generally against it."

Apprenticed to a carpenter, he worked at his trade for some twenty years and was one of the founders of the Amalgamated Society of Carpenters, but during all this time his mind was busy with peace and the means whereby it might be brought about and maintained. A laborer and a friend of labor, he saw that the triumph of the North in our civil war was the triumph of free labor and he cooperated with John Bright and the other friends of freedom in Great Britain to enlist the sympathy of labor for the North, even although the lack of cotton closed the mills and reduced the workmen to idleness and starvation. In the same way in the year 1870, during the Franco-German war, Mr. Cremer threw the weight of his influence to force England to a policy of neutrality when a large section of the British public urged the Government to side against France in the controversy. He organized for this purpose the Workmen's Peace Association, and when at the close of the war another section of the public wished the Government to intervene in behalf of France his league of workingmen declared for strict neutrality. From the year 1870 Mr. Cremer became identified with the cause of peace and arbitration, and the balance of his long and useful life was devoted to the cause. Mr. Cremer noticed that the friends of peace had held meetings, that they had promoted petitions to Parliament, but that little or nothing definite resulted from them. He believed that Great Britain and the United States were the two nations most likely to take the initiative in international arbitration, and he therefore set about doing two things — first, to organize labor for the cause of arbitration, and to bring the influence of labor to bear upon Great Britain and the United States, in which the Governments respond most readily to public opinion.

The league of workingmen was therefore transferred into the International Arbitration League. The new league was in close touch with the labor organizations, and indeed was in no uncertain measure the mouthpiece of enlightened and organized labor, but it differed from the older league of workingmen in that the purpose of the league was not merely to safeguard the interests of workingmen in general, but more particularly by international arbitration. The first few years of Mr. Cremer's activity were devoted to the extension of the league's influence, at home and abroad. In 1875 the league began work in Paris, and during the ensuing twenty-five years exercised a great influence in favor of arbitration, especially in 1900, when war threatened to break out between France and Great Britain over the Fashoda incident. Again, in 1878, as in the sixties and in 1870, Mr. Cremer's league, by public demonstrations, took firm ground against the clamor for war against Russia on behalf of the Turk.

Having thus organized an international arbitration league and converted labor to arbitration, Mr. Cremer felt his presence in the House of Commons would increase the influence of the cause to which his life was devoted. That his ambition was not personal but was merged in the cause of arbitration is evidenced by the fact that in his contest at Warwick in 1868 as a radical member for Parliament he advocated international arbitration in his address to the electors as a more humane and economical method than war, and again in 1874 he appealed to the electorate on the platform of international arbitration. Defeated on each occasion, he was returned to Parliament in 1885.

As a member of Parliament he enjoyed an influence which he did not possess as a private citizen, and within two years after his election Mr. Cremer proceeded to carry out his program. He felt that the United

States should take the initiative in the matter of arbitration and that a proposal made by the United States to Great Britain would be accepted. He circulated a petition among members of Parliament to that effect, and although he did not expect to get more than fifty signatures he obtained two hundred and thirty-four, including the well-known names of John Bright and Joseph Chamberlain. Accompanied by twelve members of Parliament Mr. Cremer took the memorial to Washington, where he was received by President Cleveland and had the satisfaction of reading the memorial to the President and Congress. The visit of Mr. Cremer and his friends was unofficial, but it enlisted the sympathy of the American Government. In 1888 the late John Sherman reported to the Senate a concurrent resolution requesting the President:

> To invite, from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two Governments which can not be adjusted by diplomatic agency, may be referred to arbitration, and be peaceably adjusted by such means.

This resolution was adopted by the Senate February 14, 1890, and the House of Representatives April 3, 1890. The United States therefore was prepared to enter into a treaty of arbitration. Mr. Cremer thereupon sought with renewed effort to influence Great Britain to conclude an arbitration treaty with the United States, and in 1893 his resolution in favor of an Anglo-American treaty of arbitration, seconded by Sir John Lubbock (Lord Avebury), warmly supported by Mr. Gladstone and Sir William Harcourt, was unanimously carried. Mr. Cremer thereupon prepared another memorial to the President and Congress of the United States, which was signed by three hundred and fifty-four members of Parliament. This Mr. Cremer took to Washington and presented to Mr. Cleveland, and the memorial was publicly read in Congress and placed upon its records. The result of Mr. Cremer's enthusiasm was the Olney-Pauncefote treaty of arbitration between Great Britain and the United States, which unfortunately failed of ratification in the Senate by three votes in 1897. The defeat of the treaty was from every point of view a public, indeed an international, misfortune, because it was and is the model treaty of international arbitration, and the acceptance of such a treaty by Great Britain and the United States would have incalculably advanced the cause of arbitration. The present treaties, with their reserves of independence, vital interests, and honor, are not to be classed with this international agreement, which excluded only from arbitration questions of independence and provided a permanent court between the two countries in which international controversies might be adjusted by judicial means. The Hague Conferences, however, and the impetus given by them to arbitration, will no doubt recover the lost ground, but vital interests and so-called questions of honor are likely to figure in international agreements for years to come.

Mr. Cremer had had great experience with the workingmen and the public generally, and while able to convince them of the wisdom of arbitration and peaceful settlement of international difficulties he found that the intelligent and enlightened members of parliamentary bodies were difficult to reach and persuade. To settle a difficulty it is necessary to understand it, and a dispute is unlikely to assume serious consequences between people who understand and respect each other's motives. Mr. Cremer therefore felt that good understanding between foreign nations would be best promoted by an interchange of thought and views between various members of the parliamentary bodies, and that agreements reached by them in informal and unofficial reunions would be likely to succeed in the various parliaments if accepted in advance by members pledged to secure their enactment. Therefore, in 1888 Mr. Cremer hit upon the plan of an interparliamentary union, which met for the first time at Paris in 1888, with thirty-four members in attendance. This was a preliminary meeting. In 1889 the organization was launched and held its first formal meeting at Paris on the anniversary of the French Revolution, whose watchword was the watchword of progress, liberty, equality, fraternity. Ninety-nine French and British members attended, and the distinguished French statesman Jules Simon presided. It is impossible to overestimate the importance of the union and its work, for it has brought together the legislators of constitutional countries pledged in advance to cooperate in the cause of peace and progress. It should not be forgotten that at the session of 1894 the Interparliamentary Union proposed a plan for a permanent court of arbitration not unlike that adopted by the First Hague Conference, and that at the session of 1895 M. Descamps, as president of the union, was authorized to issue his famous Mémoir to the powers in favor of international arbitration, which was at once a program and a manifestation; nor should it be overlooked that the Interparliamentary Union drafted the plan of compulsory arbitration which secured the approbation of the overwhelming majority of the countries represented at the recent Hague Conference, and it should be stated that the Second Hague Conference owed its existence to the resolution adopted by the Interparliamentary Union at St. Louis in 1904. From a small group of thirty-four members, representing two nations, the Interparliamentary Union has grown into a large assembly of well-nigh a thousand, and its annual meetings are international events.

Mr. Cremer's services to peace were therefore great, and the Nobel Peace Prize, which he received in 1903, was a fitting international recognition of his services, as was the knighthood conferred upon him in 1907 by the present enlightened sovereign of Great Britain. Mr. Cremer believed that arbitration, like virtue, was its own reward. It was with him a question of faith. Sprung from the working classes, pinched by poverty, his soul was untouched by ambition or a desire for wealth. He accepted the knighthood upon its second offer because it seemed to him a tribute to labor, just as Lord Macaulay considered the peerage as a homage to literature, and it is characteristic of the man that he touched not a penny of the Nobel Prize, amounting to $40,000, but handed it over as an endowment for the International Arbitration League, which he had organized, whose secretary he had been for many years, and which was the means by which he accomplished much that was noble and worthy for his fellowman. A philanthropist from boyhood, his life was mercifully extended to four score years, so that he might see the fruit of his good works and rejoice at their success.

## THE WHEWELL PROFESSORSHIP OF INTERNATIONAL LAW

Readers of the American Journal of International Law will be pleased to learn that Dr. Oppenheim, the author of the very interesting and valuable paper on "The Science of International Law: Its Task and Method," which appeared in the April number of the Journal for the current year, was, on the 31st day of July, elected Whewell professor of international law at the University of Cambridge. The professorship is in itself a great honor. It was founded in the sixties by Dr. William Whewell, master of Trinity College, with the express injunction that the occupant of the chair should, to quote the language of Sir Henry Maine, "make it his aim, in all parts of his treatment of the subject, to lay down such rules and suggest such measures as might tend to diminish the evils of war and finally to extinguish war among nations."

The occupants of the chair have been men eminently worthy of the trust. The first professor, elected in 1869, was the late Sir William Harcourt, known by the admirable letters of Historicus, in the London Times, on some questions of international law arising out of the American civil war; and in the politics of Great Britain known as the faithful and earnest follower of Mr. Gladstone, whether as Solicitor-General, Home Secretary, Chancellor of the Exchequer, or leader of the House of Commons. The second incumbent was a man no less distinguished, namely, Sir Henry Maine, whose works on ancient law, early law and custom, and early history of institutions and village communities have given him high rank among the historical school of jurisprudence, and whose lectures on international law, delivered as Whewell professor, caused a profound regret that his life might not have been spared for the science of Grotius. Dr. Oppenheim's immediate predecessor was Prof. John Westlake, a recognized authority on international law, one of the founders of the Revue de Droit International et de Législation Comparée, a member of the Institute of International Law since its foundation in 1873, and its past president. His recent work on International Law in two small volumes, published by the Cambridge University Press, is the result of a lifetime of study, and will always rank as a thoughtful and valuable contribution to the science.

To say that Dr. Oppenheim is worthy of his predecessors is in itself great praise, but it is the simple fact, recognized by Professor Westlake himself, whose choice Dr. Oppenheim was. Born in Germany in 1858, Dr. Oppenheim is barely fifty years of age, and we may hope that he still has a long and distinguished career before him. For years he was professor of criminal law on the Continent at Freiburg, in Baden, and Basle, in Switzerland. From the year 1885 to 1895 he devoted himself chiefly to jurisprudence as governing criminal law in a series of works published in Germany and highly respected by German scholars. From 1895 to the present day he has devoted himself solely to international law, and for the past few years was lecturer in public international law at the London School of Economics and Political Science of the University of London. His most important publications in the field of international law are the Treatise (Volume I, Peace, 1905; Volume II, War, 1906), published by Longmans Green & Co., and "The Science of International Law: Its Task and Method," which the AMERICAN JOURNAL OF INTERNATIONAL LAW had the honor to publish in its April number. It is not too much to say that Dr. Oppenheim's Treatise is fully abreast of the most exacting scholarship of Germany, that it is profoundly scientific, that it is broad and generous in its conception and execution and wonderfully free from national prejudices, which so often and so curiously mar treatises on international law.

It is not too much to say that the University of Cambridge and Dr. Oppenheim are equally honored and fortunate in the choice of the Whewell professor.

### THE BALKAN SITUATION

The proclamation of Bulgarian independence, made October 5, 1908, at Tirnovo, the ancient capital of Bulgaria; the simultaneous annexation of Bosnia and Herzegovina by Austria-Hungary; and the raising of the Grecian flag by Crete have made the Balkan Peninsula once again the storm center of Europe. The status established by the Treaty of Berlin of July 13, 1878, (for which see Supplement) is violated by each of these three events, for by the terms of the treaty Bulgaria is constituted an autonomous and tributary principality under the suzerainty of the Sultan (Article I); the provinces of Bosnia and Herzegovina are to be occupied and administered by Austria-Hungary (Article XXV) and, although the status of Crete has been modified by subsequent agreement, Article XXIII of the treaty of Berlin recognizes the sovereignty of the Porte over the island. The annexation of Eastern Roumelia by Bulgaria in 1885 was a violation of the treaty, and incorporated as it is with Bulgaria, the recognition of the independence of Bulgaria will carry with it not only its loss but the loss of Eastern Roumelia, which by Article XIII of the treaty was to be and remain "under the direct political and military authority of His Imperial Majesty the Sultan, under condition of administrative autonomy."

It can not be said, however, that the three events were unexpected or that they profoundly changed the *actual* relations of the various territories of Turkey; for as a matter of fact Bosnia and Herzegovina are occupied and administered by Austria-Hungary, and although Bulgaria is technically dependent upon Turkey, it is recognized and treated as an independent state, and as such took part in the proceedings of the Second Hague Conference. Crete, while acknowledging the suzerainty of Turkey, is autonomous, governed by a governor-general recommended by Greece, and who is, at the present time, a former prime minister of Greece. As a matter of fact the territories in question are independent of Turkey; from the legal standpoint a dependent relation exists. Should Turkey recognize the events which have taken place as *faits accomplis* the Porte would lose but a theoretical claim of right which it can not hope to make effective. Acquiescence would weaken the prestige of the reform movement; war might abrogate the constitution and postpone indefinitely the blessings of constitutional government.

As the signatory powers to the treaty of Paris declared in 1871 that "it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement," it would seem that the various acts would need confirmation by the signatory powers of the treaty of Berlin in order to have the sanction of law. A conference of the powers would seem to be logical if not inevitable and it is to be hoped that the conference will meet in peace and not at the end of a war.

# CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

*December, 1907.*

5 Chile—Persia. Ratifications exchanged at Washington of treaty of friendship and commerce signed at Washington, March 30, 1903. *B. di legislazione e statistica doganale e commerciale* (Rome), 25:129.

*March, 1908.*

24 Honduras—Mexico. Convention relative to parcels post signed at Mexico. *La Gaceta*, Tegucigalpa, June 20.

24 Honduras—Mexico. Extradition treaty signed at Mexico. *La Gaceta*, June 17.

24 Honduras—Mexico. Treaty signed at Mexico. Friendship, commerce and navigation. *La Gaceta*, Tegucigalpa, June 12. Ratified by Honduras May 28.

*April, 1908.*

9 Great Britain—Spain. Agreement signed at Madrid amending Article 5 of the agreement of November 25, 1875, respecting the postal service between Gibraltar and Spain. *Treaty ser.*, 1908, No. 16.

*April, 1908.*

1 GENEVA RED CROSS CONVENTION of 1864 has by this date been ratified or adhered to by: Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Columbia, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Honduras, Haiti, Italy, Japan, Kongo, Korea, Luxemburg, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Persia, Peru, Portugal, Panama, Paraguay, Roumania, Russia, Salvador, Servia, Siam, Spain, Turkey, Uruguay, Venezuela, Sweden, and Switzerland. *Staatsb.*, 1908, No. 120.

13 GREAT BRITAIN—PANAMA. Parcel post agreement signed at Panama. *Treaty ser.*, 1908, No. 15.

15 FRANCE—SPAIN. Second additional protocol signed at Paris to amend articles 4 and 5 of the convention signed August 18, 1904, respecting trans-Pyrenean railways. *Ga. de Madrid,* June 23.

20 CHINA—GREAT BRITAIN. Treaty signed at Calcutta. Trade relations with Tibet. The arrangements are based generally on the regulations of 1893. The principle of extraterritoriality is introduced. Article V: "The Tibetan authorities, in obedience to the instructions of the Pekin Government, having a strong desire to reform the judicial system of Tibet and to bring it into accord with that of Western nations, Great Britain agrees to relinquish her rights of extra-territoriality in Tibet whenever such rights are relinquished in China, and when she is satisfied that the state of the Tibetan laws and the arrangements for their administration and other considerations warrant her in so doing." *Times,* June 9, 12; *North China Herald,* 87:757; *Gazette of India,* May 20; *Mém. dipl.,* August 16. *See April 27, 1906.*

30 SPAIN. Royal decree putting into force provisional regulations for the application of the emigration law of December 21, 1907. *Ga. de Madrid,* May 6 and 11.

*May, 1908.*

4 BELGIUM—ITALY. Declaration signed at Rome relative to reciprocal admission of medicinal products and pharmaceutical remedies. *B. Usuel,* 10:228; *Monit.,* May 27.

4 GREAT BRITAIN—NORWAY, SWEDEN. Exchange of notes at Christiania and Stockholm relative to the agreement of July 12, 1881,

*May, 1908.*

for the mutual relief of distressed seamen. *Treaty ser.*, 1908, No. 19.

5 Denmark. New customs tariff signed. Goes into effect January 1, 1909, with the exception of the duties on alcoholic beverages and tobacco which went into effect May 6. The tariff has been reduced on the whole. Duties on raw materials and articles required in manufactures have been considerably reduced, and in a number of cases abolished. The duty on coal has been reduced from 24 cents to 8 cents per ton and is to be entirely removed in four years. *Cd.*, 4267.

7 Salvador. Legislative decree sanctioning executive decree of April 13, 1908, establishing the basic principles on which should rest the treaties with foreign nations. *Compilación de leyes, decretos y otras disposiciones dictados en el ramo de relaciones exteriores, 1908,* San Salvador.

14 Brazil. Decree No. 6948 regulating the naturalization of aliens. *B. A. R.*, August.

14 Venezuela. Decree requiring transshipment of all goods from and to Maracaibo and other ports in Western Venezuela at Puerto Cabello instead of at Willemstad, as formerly. Netherlands, in view of the effect of this decree on the trade of Curaçao, insists that it be revoked by November 1, 1908.

14 China—Japan. Yalu forestry agreement signed at Peking. Text, *North China Herald*, 87:624. Regulations of the Chino-Japanese Timber Co., in accordance with Article X of the protocol annexed to the agreement respecting Manchuria.

22 Belgium—Greece. Ratifications exchanged at Athens of declaration signed at Athens April 9, 1908. *B. Usuel*, 10:235; *Monit*, June 1, 2. Additional to the extradition treaty signed July 9, 1901. Extends list of extraditable offenses.

24 Colombia—Ecuador. Boundary treaty signed at Bogotá. Approved by Colombia August 10. *Diario oficial* (Bogota), August 13. *See June 5, 1907. Informe....Min. rel. ext* (Quito) 1908.

25 Colombia—Japan. Treaty of friendship, commerce and navigation signed at Washington. Ratified by Colombia, August 18. *Diario oficial,* August 22.

26 Sixth International Congress of Publishers, at Madrid. Adjourned May 30. Previous congresses were held in Leipzig, 1901; Milan, 1906. For proceedings, *Dr. d'auteur,* 21:69.

*May, 1908.*

29 INTERNATIONAL POLAR CONGRESS convened at Brussels. The first congress was held at Brussels in 1906. For origin and history of the international association for study of the polar regions, see *Congrès international pour l'étude des regions polaires tenu à Bruxelles du 7 au 11 septembre 1906*, Bruxelles, 1906.

30 COLOMBIA—SPAIN. Convention signed at Madrid. Ratified by Colombia, August 13. *Diario oficial,* August 19. Foreign judgments.

30 GREAT BRITAIN—ITALY. Agreement signed at Rome respecting commercial travellers' samples. *Treaty ser.,* 1908, No. 20. To facilitate the clearance through their respective customs departments of samples of dutiable goods brought into the territories of one of them by commercial travellers of the other, to be used as models or patterns for the purpose of obtaining orders and not for sale. Great Britain has similar agreements with Austria-Hungary, Belgium, Egypt, France, Germany, Norway, Russia, Sweden, Switzerland and the United States.

30 SAN MARINO. Adhesion to convention signed at Rome, June 7, 1905, for creation of an international institute of agriculture. *Staatsb.,* 1908, No. 117. *See January 29, 1908.*

*June, 1908.*

1 AUSTRIA—SWEDEN. Entrance into effect of reciprocal protection of copyrights. Swedish decree of May 29, 1908 in *Svensk Forfattnings-Samling,* No. 36, May 30; Austrian order in *Reichsgesetzblatt,* No. 101, May 26; *Dr. d'auteur* 21:82.

1 ELEVENTH INTERNATIONAL NAVIGATION CONGRESS opened at St. Petersburg. *Times,* June 2. Former congresses were held at (1) Brussels, 1885; (2) Vienna, 1886; (3) Frankfort, 1888; (4) Manchester, 1890; (5) Paris, 1892; (6) The Hague, 1894; (7) Brussels, 1898; (8) Paris, 1900; (9) Dusseldorf, 1902; (10) Milan, 1905. The first six were known as international congresses on inland navigation. The first international maritime congress was held at Paris 1889, the second at London 1893. The two bodies thereafter by fusion met as international navigation congresses. *Catalogue of the publications concerning the navigation congresses,* Brussels, 1904.

1 FIFTH INTERNATIONAL COTTON CONGRESS opened at Paris. *Times,*

*June, 1908.*

June 2, 5. First congress was held at Zurich. Adjourned June 3. Next congress in Italy. *See May 27, 1907.*

2 TURKEY. Financial and technical conventions respecting the building of the four sections of the Bagdad railway signed at Constantinople. *The Baghdad railway, Spectator,* June 27.

3 INTERNATIONAL COLONIAL INSTITUTE in annual session at Paris. *See June 17, 1907.*

3 CHINA—FRANCE. Chinese regulars attack French troops at Pha Long and pillage Chima, on Tongking frontier. *Q. dipl.,* 25:876. For French demands see *Times,* June 13, 22.

4 FIRST INTERNATIONAL CONGRESS AGAINST DUELLING opened at Budapest. *Mem. dipl.,* June 14.

4 GREAT BRITAIN—UNITED STATES. Ratifications exchanged at Washington of treaty signed at Washington, April 11, 1908; ratification advised by the Senate, May 4, 1908; ratified by the President, May 11, 1908; ratified by Great Britain, May 16, 1908; proclaimed July 1, 1908. *U. S. Treaty ser.,* No. 497; *Geographical J.,* 33:309; *Documents, ante,* 2:306. Canadian international boundary. The treaty treats of the boundary in eight different sections. In six sections the work of survey and demarcation is intrusted to two expert geographers or surveyors, one for each contracting party; for the section between the intersection with the St. Lawrence and the mouth of Pigeon river, on the western shore of Lake Superior, the reestablishment of the boundary is left in the hands of the International Waterways Commission; as regards the boundary from the summit of the Rocky mountains to the Gulf of Georgia the work will be done by the commissioners already designated by concurrent action of the two governments in 1902 and 1903. In Passamaquoddy bay the commissioners appointed under the treaty of 1892 failed to agree in respect of a small part of the line on either side of Lubec Narrows channel, and the possibility of a similar disagreement is provided for. In this, as in other possible cases of dispute, the decision is to rest with an arbitrator. *Stat. at L.,* vol. 35.

4 GREAT BRITAIN—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington April 4, 1908. *Treaty ser.,* 1908, No. 21; *Documents,* 2:298; *Stat. at L.,* vol. 35.

*June, 1908.*

4 GREAT BRITAIN—UNITED STATES. Ratifications exchanged at Washington of treaty signed at Washington, April 11, 1908; ratification advised by the Senate, April 17, 1908; ratified by the President, May 11, 1908; ratified by Great Britain, May 12, 1908; proclaimed, July 1, 1908. *U. S. Treaty ser.,* No. 498. Fisheries in United States and Canada waters. *Stat. at L.,* vol. 35; *Documents,* 2:322.

4 UNITED STATES—URUGUAY. Ratifications exchanged at Montevideo of treaty signed at Washington, March 11, 1905; ratification advised (with amendment) by the Senate, March 18, 1905; ratified by the President, April 12, 1908; ratified by Uruguay, May 27, 1908; proclaimed, July 10, 1908. *U. S. Treaty ser.,* No. 501; *Documents, post.* Extradition.

5 UNITED STATES—URUGUAY. Parcels post convention approved by President of United States. Signed at Washington, February 10, 1908; at Montevideo, April 26, 1908.

6 UNITED STATES. Adhesion to arrangement signed at Paris, May 18, 1904; ratification advised by the Senate, March 1, 1905; proclaimed, June 15, 1908. *U. S. Treaty ser.,* No. 496. Repression of trade in white women. Signatory and ratifying powers: Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, Netherlands, Portugal, Russia, Sweden, Norway, Switzerland. Austria-Hungary and Brazil have adhered. *B. Usuel,* 10:240; *Staatsb.,* 1908, No. 85; *Reichs-G.,* 1908, No. 45; *J. O.,* July 18; *Documents, post; Treaty ser.,* 1908, No. 25; *id.,* 1907, No. 39; *J. du dr. int. prive,* 34:1254. *See October 22, 1906* and *May 14, 1907.*

7 FRANCE. Fifth national congress of peace at Rochelle. Proceedings in *Mém. dipl.,* June 14. Adjourned June 10.

7 MOROCCO. Mulai Hafid enters Fez.

8 SAN MARINO—UNITED STATES. Ratifications exchanged at Rome of treaty signed at Rome, January 10, 1906; ratification advised by the Senate, April 17, 1908; ratified by the President, May 7, 1908; ratified by republic of San Marino, February 19, 1906; proclaimed, June 12, 1908. Takes place of unperfected treaty of March 15, 1905. *U. S. Treaty ser.,* No. 495; *Documents, post; Stat. at L.,* vol. 35.

*June, 1908.*

8 NINETEENTH ANNUAL CONGRESS OF THE INTERNATIONAL MINERS' FEDERATION opened at Paris. Adjourned June 12. Next congress at Brussels in 1909. Proceedings in *Mém. dipl.,* June 14. *See September 16, 1907.*

10 INTERNATIONAL CONGRESS ON FIRST AID AND LIFE SAVING opened at Frankfort. Next congress at Vienna.

11 INTERNATIONAL CONFERENCE ON ELECTRICAL TELEGRAPHY at Lisbon adjourned. Next congress at Paris in 1915. *Mém. dipl.,* June 14.

12 BELGIUM—GERMANY. Ratifications exchanged at Brussels of convention signed at Brussels, October 16, 1907. Literary and artistic property. *Monit.,* June 25; *B. Usuel,* 10:235; *Reichs-G.,* 1908, No. 37. Takes effect July 12, 1908. Substantially the same as the treaty between Germany and France signed April 8, 1907. *Dr. d'auteur,* 21:81, 105.

13 BELGIUM—NETHERLANDS. Ratifications exchanged at The Hague of convention signed at The Hague, October 8, 1907, approving arrangement signed at Flessingue, April 30, 1907. *Monit.,* July 6, 7; *B. Usuel,* 10:232. Improving the lighting and buoyage of the Scheldt. *Staatsb.,* 1908, No. 203.

15 INTERNATIONAL WOMAN SUFFRAGE CONGRESS opened in Amsterdam. Previous congress was held at Copenhagen. Next meeting in England. *Harper:* The international woman suffrage congress, *Independent,* July 23.

15 FRANCE—UNITED STATES. Parcels post convention signed at Washington. Ratified by President of the United States, July 3. Ratifications exchanged at Washington, August 14. Proclaimed in France September 10. *J. O.,* September 14.

16 ITALY—UNITED STATES. Parcels post convention signed at Washington. Approved by the President on the same date. Takes effect August 1. Parcels are accepted up to five kilograms in weight. *L'union postale,* 33:127.

18 THE INTERNATIONAL CLAIMS COMMISSION holds its inaugural session at Casablanca. Adjourned August 14 for five weeks.

23. PERSIA. National Assembly forcibly broken up by the Shah's troops. *The turmoil in Russia, Spectator,* July 4; *Hamilton: The Persian crisis, Fortnightly R.,* 84:201; *Browne: The Persian crisis, a reply, id.,* 84:687; *Dillon: A picture of latter-day Persia,*

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*Contemporary R.*, August. On September 8, an identical British and Russian note was presented to the Shah drawing his attention to disturbances in the provinces and especially to the danger to foreigners at Tabriz, and suggesting new elections for November. The Shah has since set November 13 for the elections. *Spectator*, September 12; *La revolution persane et l'accord anglo-russe, R. des deux mondes*, 44:622.

24 NORWAY—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, April 4, 1908; ratification advised by the Senate, April 17, 1908; ratified by the President, June 18, 1908; ratified by Norway, May 23, 1908; proclaimed, June 29, 1908. *U. S. Treaty ser.*, No. 499. "Providing for submission to arbitration of all questions of a legal nature or relating to the interpretation of treaties, which may arise between the two countries and which it may not have been possible to settle by diplomacy."

25 ABYSSINIA—BELGIUM. King of Abyssinia notified of Belgium's ratification of commercial treaty signed at Adis Ababa, September 6, 1906. Takes effect August 25, 1908. Most favored nation treatment in residence, commerce and customs. Term: Ten years and until denouncement. *B. Usuel*, 10:242; *Monit., July* 13, 14.

27 MEXICO—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, March 24, 1908; ratification advised by the Senate, April 2, 1908; ratified by the President, May 29, 1908; ratified by Mexico, May 30, 1908; proclaimed, June 29, 1908. *U. S. Treaty ser.*, No. 500; *Documents, ante*, 2:300. "Providing for the submission to arbitration of all questions of a legal nature or relating to the interpretation of treaties, which may arise between the two countries and which it may not have been possible to settle by diplomacy."

29 CUBA—UNITED STATES. Postal money order convention signed at Washington. Cuban decree notifying, July 3. Ratifications exchanged at Washington, July 6. *Ga. Oficial*, July 27; *B. oficial del dep. de estado*, August.

30 GREAT BRITAIN—UNITED STATES. Ratifications exchanged at Washington of treaty signed at Washington, May 18, 1908; ratification advised by the Senate, May 20, 1908; ratified by the President, June 19, 1908; ratified by Great Britain, June 3, 1908;

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proclaimed, July 10, 1908. *U. S. Treaty ser.*, No. 502; *Treaty ser.*, 1908, No. 22; *Documents, ante*, 2:303. For the conveyance of persons in custody for trial either in Canada or the United States through the territory of the other; and for reciprocal rights in wrecking and salvage in the waters contiguous to the boundary between the United States and Canada.

30 SECOND HAGUE PEACE CONFERENCE. Expiration of the period within which, by virtue of the Final Act, must be signed the Conventions, Declaration and Final Act of the Second International Peace Conference at The Hague. For table of the States which have signed these instruments up to this date, see pages 876, 877. For particulars concerning the reservations therein noted see *Cd.*, 4175, p. 144. *Fried: Die Zweite Haager Konferenz, Ihre Arbeiten, ihre Ergebnisse, und ihre Bedeutung*, Leipzig, 1908; *Renault: L'œuvre de La Haye, 1899 et 1907, Ann. sc. pol.*, 23:429; *Cd.*, 4174, 4175, 3857; *Doc. dipl.; Deuxième conférence internationale de la paix, 1907; Guillaume: Deuxième conférence de la paix. Rapport sur la convention pour le règlement pacifique des conflits internationaux; La Belgique et l'arbitrage obligatoire à la deuxième conférence de la paix*, Bruxelles, 1908; *Deuxième conférence internationale de la paix*, 3 vols. *Ministère des affaires étrangères, La Haye, 1907; Scott: Texts of the peace conferences at The Hague, 1899 and 1907*, Boston, 1908; *Scott: The Hague Peace Conferences, 1899 and 1907*, 2 vols., Baltimore, 1908; *Lagemans: Receuil*...... vol. 16. *See October 18, 1907.*

*July, 1908.*

1 COSTA RICA—ITALY. Convention signed March 16, 1908, for exchange of parcels by post became effective. *B. A. R.*, August. Value limited to 500 francs.

1 NETHERLANDS—UNITED STATES. Arrangement for exchange of postal parcels takes effect. Parcels are accepted up to two kilograms in weight (= 4 lb. 6 oz.). *L'union postale*, 33:127. Signed at Washington, May 10, 1907; at The Hague, March 19, 1908; ratified by Netherlands, March 24, 1908; approved by the President, May 10, 1907.

*July, 1908.*

1 ITALY. Deposit at Brussels of ratifications of Additional Act signed August 28, 1907, and of the protocol signed December 19, 1907. Sugar union. *Lagemans,* 16:425 and 527; *Staatsb.,* 1908, Nos. 93 and 123; *Reichs-G.,* 1908, No. 42. *See March 23, 31* and *August 1, 1908.*

1 INTERNATIONAL RADIOTELEGRAPHIC CONVENTION takes effect. Signed at Berlin, November 3, 1906. The subject-matter of the convention is comprised in four documents: (1) The convention itself, which consists of 23 articles, the greater proportion being concerned with the financial arrangements of the service, the procedure of the various legislatures concerned, the institution of an international bureau on the same lines as that already existing for wire telegraphy, and similar matters of organization; (2) the additional undertaking; (3) the final protocol, and (4) the service regulations. Article 3:

> The coastal stations and the stations on shipboard shall be bound to exchange wireless telegrams without distinction of the wireless telegraph system adopted by such stations.

Signatory powers: Germany, United States, Argentine Republic, Austria, Hungary, Belgium, Brazil, Bulgaria, Chile, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Monaco, Norway, Netherlands, Persia, Portugal, Roumania, Russia, Sweden, Turkey, Uruguay. *Times,* June 24, 1908; *Staatsb.,* 1908, No. 97; *Reichs-G.,* 1908, No. 38. By this date all parts have been ratified by Germany, Belgium, Brazil, Bulgaria, Denmark, Spain, Norway, Netherlands, Roumania and Sweden. The convention, final protocol and regulations have been ratified by Great Britain, Japan and Mexico. Mexico has also adhered to the additional engagement, not signed by her. Great Britain has adhered to the convention for Canada, Australia, Newfoundland, Cape Colony, Natal, Transvaal, India and her other colonies and protectorates. The ratifications are deposited at Berlin in virtue of Article 23 of the convention and Article 3 of the additional engagement. Persia has since ratified. *The progress of wireless telegraphy, Spectator,* April 18; *Meili: Die drahtlose telegraphie im internen Recht und Völkerrecht,* Zurich, 1908; *Cd.,* 3264; *Scholz: Drahtlose Telegraphie und Neutralität,* Berlin, 1905.

*Table of signatures appended to the Hague Conventions of 1907 to June 30, 1908.*

| | I Pacific settlement of international controversies. | II Force in recovery of contract debts. | III Opening of hostilities. | IV Laws and customs of war on land. | V Neutrals in war on land. | VI Hostile merchant vessels at beginning of hostilities. | VII Transformation of merchant into war vessels. | VIII Submarine contact mines. | IX Bombardment by naval forces. | X Geneva Convention and maritime war. | XI Capture in maritime war. | XII International Prize Court. | XIII Neutral powers in maritime war. | XIV Declaration. Projectiles from balloons. | XV Final act. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. Germany | | | | R | | R | | R | R | | | | R | * | |
| 2. United States | R | | | | | * | * | | | | | | * | | |
| 3. Argentina | | R | | | R | | | | | | | | | | |
| 4. Austria-Hungary | | | | R | | | | | | | | | | | |
| 5. Belgium | | * | | | | | | | | | | | | | |
| 6. Bolivia | | R | | | | | | | | | | | | | |
| 7. Brazil | R | * | | | | | | | | | | * | | | |
| 8. Bulgaria | | | | | | | | | | | | | | | |
| 9. Chile | R | | | | | | | | R | | | R | | * | |
| 10. China | | * | * | * | * | * | * | * | * | R | * | * | * | | |
| 11. Colombia | | R | | | | | | | | | | | | | |
| 12. Cuba | | | | | | | | | | | | R | * | | |
| 13. Denmark | | | | | | | | | | | | | | * | |
| 14. Dominican Republic | | R | | | | | * | R | | | | * | R | | |
| 15. Ecuador | | R | | | | | | | | | | R | | | |
| 16. Spain | | | | * | | | | * | * | | | | * | * | |
| 17. France | | | | | | | | R | R | | | | | * | |
| 18. Great Britain | | | | | R | | | R | R | R | | * | R | | |

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 19. Greece | R | R | | | | | | | | | | * | | | |
| 20. Guatemala | | R | | | | | | | | | | R | | * | |
| 21. Haiti | | | | | | | | | | | | R | | | |
| 22. Italy | | | | | | | | | | | | | | * | |
| 23. Japan | R | | | R | | | | | R | | | * | R | * | |
| 24. Luxemburg | | * | | | | | | | | | | * | | | |
| 25. Mexico | | | | | | | | | | | | | | * | |
| 26. Montenegro | | | | R | | | | * | | | * | * | | * | |
| 27. Nicaragua | * | * | * | * | * | * | * | * | * | * | * | * | * | * | |
| 28. Norway | | | | | | | | | | | | | | | |
| 29. Panama | | | | | | | | | | | | | | | |
| 30. Paraguay | | | | | | | | | | | | | | * | * |
| 31. Netherlands | | | | | | | | | | | | | | | |
| 32. Peru | | R | | | | | | | | | | | | | |
| 33. Persia | | | | | | | | | | R | | R | R | | |
| 34. Portugal | | | | | | | | * | | | | | | | |
| 35. Roumania | R | * | | | | | | | | | | * | | * | |
| 36. Russia | | | | R | | R | | * | | | * | * | | * | |
| 37. Salvador | | R | | | | | | | | | | R | | | |
| 38. Servia | | | | | | | | | | | | * | | * | |
| 39. Siam | | * | | | | | | R | | | | R | R | | |
| 40. Sweden | | * | | | | | | * | | | | | | * | |
| 41. Switzerland | R | * | | | | | | | | | | | | | R |
| 42. Turkey | R | | | R | | | R | R | | R | | R | R | | |
| 43. Uruguay | | R | | | | | * | | | | | R | | | |
| 44. Venezuela | | * | | | | | | | | | | * | | * | |

* — Not signed. R — Signed with reservations. All others have been signed without reservations.

*July, 1908.*

2 DENMARK—FRANCE—GERMANY—GREAT BRITAIN—NETHERLANDS—SWEDEN. Ratifications deposited at Berlin of declaration and memorandum concerning the maintenance of the *status quo* in the territories bordering upon the North Sea. *Treaty ser.*, 1908, No. 23; *Documents, ante,* 2:272; *J. O.*, July 19; *de Floeckher: La question de la mer Baltique et de la mer du Nord. Le point de vue allemand, R. générale de dr. int. public,* 15:125. *See April 23, 1908.*

2 PERSIA. Royal rescript to the effect that the Constitution will be preserved, and elections for a new Mejliss held. *Times,* July 2, 4.

2 CHINA—SWEDEN. Treaty signed at Peking modifying treaty signed at Canton March 20, 1847. *State Papers,* 56:1097. Contains 17 articles and emphasizes principles of reciprocity.

4 CYPRUS. The Cyprus Courts of Justice Order, 1908. British order in council amending orders of 1882 and 1902. Cyprus is administered by Great Britain under the convention with Turkey signed at Constantinople, June 4, 1878 (*For. rel.*, 1878), under which Turkey receives annually £92,800. *London Ga.*, July 10.

11 BRAZIL—NETHERLANDS. Ratification by Netherlands of treaty signed May 5, 1906. *Lagemans,* 16:82. Boundary of Surinam. *Staatsb.*, 1908, No. 220. Ratifications exchanged at The Hague, September 15.

11 GREAT BRITAIN—PERSIA. Ceremony at Teheran of apology for disrespect to the British Legation by surrounding it with troops. For the British demand of July 2 and the Persian foreign minister's response of July 9 see *Times,* July 30.

11 NETHERLANDS—UNITED STATES. Ratification by Netherlands of commercial agreement signed at Washington, May 16, 1907. Proclaimed, August 12, 1908. Under section 3, Tariff Act of July 24, 1897. *Stat. at L.*, 30:151; *U. S. Treaty ser.*, No. 505; *Documents, post; Lagemans: Receuil* (La Haye) 16:413.

12 SLAV CONGRESS at Prague. Adjourned July 18. *Mém. dipl.*, July 26. Next conference at St. Petersburg in 1909. *Mém. dipl.*, July 19. *Beaumont: Le congrès slave de Prague, Ann. sc. pol.*, 23:573.

13 FOURTH INTERNATIONAL OLYMPIC GAMES at London. The first were held at Athens, 1896; the second at Paris, 1900; the third at St. Louis, 1904. The Athenian Olympic games in 1906 were a

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festival of a separate cycle organized by Greece. The revival of the Olympic games is an attempt to apply to modern conditions and to international sport the ideals and traditions of the festivals held in Elis by the ancient Hellenes. *Desborough: Olympic games then and now, National R.,* 51:744; *de Coubertin: Why I revived the Olympic games, Fortnightly R.,* 84:110; *Hawke: The Olympic games in London, R. of Reviews,* 38:78.

13 HOLY SEE—SPAIN. Ratifications exchanged at Madrid of protocol signed at Madrid, July 12, 1904, introducing modifications into the Concordat of 1851 as far as it relates to the expenses of public worship and of the clergy and their better distribution. *Ga. de Madrid,* July 22. The protocol creates a temporary commission, which will be empowered to modify the division of dioceses and propose suppression of some of them so as to relieve the state finances.

15 FRANCE—ITALY. French law authorizing ratification of telephone convention signed July 18, 1907. *J. O.,* July 18.

15 FRANCE. Law authorizing ratification of convention signed May 18, 1904, respecting night work by women. *J. O.,* July 18.

17 DENMARK—SWEDEN. Treaty of arbitration signed.

20 SALVADOR—UNITED STATES. Ratifications exchanged at San Salvador of convention signed at San Salvador, March 14, 1908; ratification advised by the Senate, April 13, 1908; ratified by the President, May 26, 1908; ratified by Salvador, April 23, 1908; proclaimed, July 23, 1908. *U. S. Treaty ser.,* No. 503; *Documents, post; Stat. at L.,* vol. 35. To fix the condition of naturalized citizens who renew their residence in the country of their origin. Article II:

> If a Salvadorean, naturalized in the United States of America, renews his residence in Salvador, without intent to return to the United States, he may be held to have renounced his naturalization in the United States. Reciprocally, if a citizen of the United States, naturalized in Salvador, renews his residence in the United States, without intent to return to Salvador, he may be presumed to have renounced his naturalization in Salvador.
>
> The intent not to return may be held to exist when the person naturalized in the one country, resides more than two years in the other country, but this presumption may be destroyed by evidence to the contrary.

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21 COLOMBIA—ECUADOR. Convention signed additional to treaty signed May 24, 1908, *q. v.* Ratified by Colombia, August 14. *Diario oficial,* August 20.

15–23 GREAT BRITAIN—UNITED STATES. Exchange of notes at London. Newfoundland fisheries. Renewal of *modus vivendi* of 1907. *Documents, post; U. S. Treaty ser.,* No. 504; *Hodgins: Revocation of treaty privileges to alien-subjects, Nineteenth century,* 64:653. *See September 4, 1907.*

24 TURKEY. Irade proclaiming restoration of the Constitution of 1876, which provided for the indivisibility of the empire, equality before the law irrespective of creed or race, freedom of worship, education and press; reform of taxes; inviolability of domicil; and a parliament of two houses, the upper appointive, the lower elective. In March, 1877, the Senate and chamber met; in April war with Russia broke out; in May martial law was proclaimed and in June Parliament was closed. It was dissolved in February, 1878, and the Constitution suspended. *Nation,* 87:88; *The Turkish revolution, Spectator,* August 1; *A. Rustem Bey de Bilinski, The Turkish revolution, Nineteenth Century,* 64:353; *Ann. dipl. et cons.,* 7:18; *Spectator,* August 18; Text of constitution in *Supplement, post; State Papers,* 67:683; *R. du dr. public,* 25:536 and *Mém. dipl.,* August 2 *et seq. Mundji Bey: The new constitution in Turkey,* August 13; *Mundji Bey: The regenerated Ottoman Empire, North American R.,* 188:395; *L'Italia e la nuova Turchia, Nuova antologia,* 43:141; *Blocq: Le nationalisme jeune-turc et l'Autriche-Hongrie, La grande R.,* 50:805; *Pears: The Turkish revolution, Contemporary R.,* 94:286; *Pinon: La Turquie nouvelle, R. des deux mondes,* 47:125; *Spectator, July* 25 and August 22; *Viator: The Turkish revolution, Fortnightly R.,* 84:353; *Hamilton: Turkey, the old regime and the new, Fortnightly R.,* 84:369; *von Herbert: Kamil pasha and the succession in Turkey, Fortnightly R.,* 84:419; *Brailsford: Modernism in Islam, id.,* 84:474; *Westlake: The Balkan committee and the Turkish revolution, Times,* September 5; *Documents, post; Elliott: Turkey in 1876, a retrospect, Nineteenth century,* 64:552; *Barker: The future of Turkey, Fortnightly R.,* 84:547; *Margoliouth: Constantinople at the declaration of the constitution, id.,* 84:563; *Blocq: L'Angleterre et la Turquie constitutionnelle, La nouvelle R.,* 5:381.

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27 SEVENTEENTH UNIVERSAL CONGRESS OF PEACE at London. Represented: Great Britain, United States, France, Germany, Austria, Hungary, Norway, Sweden, Italy, Russia, Japan, Denmark, Netherlands, Belgium, Switzerland, Spain, South Africa, Canada, Australia, New Zealand and Algeria. The seventeenth of a series of international peace congresses since 1889, the forerunners of which were an earlier series of peace congresses commencing in London in 1843. *London Ga.*, July 31; *Times, August* 3. Adjourned August 1. Next congress at Stockholm in September, 1909. The congresses of the present series have been held at (1) Paris, 1889; (2) London, 1890; (3) Rome, 1891; (4) Berne, 1892; (5) Chicago, 1893; (6) Antwerp, 1894; (7) Budapest, 1896; (8) Hamburg, 1897; (9) Paris, 1900; (10) Glasgow, 1901; (11) Monaco, 1902; (12) Rouen and Havre, 1903; (13) Boston, 1904; (14) Lucerne, 1905; (15) Milan, 1906; (16) Munich, 1907.

27 NINTH INTERNATIONAL GEOGRAPHICAL CONGRESS at Geneva. Adjourned August 6. *Mém. dipl.*, August 2. The prior congresses were held in (1) Antwerp, 1871; (2) Paris, 1875; (3) Venice, 1881; (4) Paris, 1889; (5) Berne, 1891; (6) London, 1895; (7) Berlin, 1899, and (8) Washington and New York in 1904. A succinct history of the earlier congresses is in *Geographical J.*, 5:369; *Chisholm: The ninth int. geographical congress, id.*, 32:364. Next congress at Rome in 1911. *Times,* August 11.

28 FRANCE—GERMANY. Ratifications exchanged at Berlin of convention signed at Berlin, April 18, 1908, to fix boundary between Kamerun and French Kongo. *J. O.*, August 15. French decree promulgating, August 11. *Geographical J.*, 32:87; *Deutsches Kolonialblatt,* May 1. *See April 18, 1908.*

28 BELGIUM—GREAT BRITAIN. Agreement signed at Brussels concerning exchange of insured letters and boxes. *Treaty ser.*, 1908, No. 24. In modification of the Agreement signed May 26, 1906.

29 GERMANY—HAITI. Commercial convention signed at Port au Prince. Went into effect September 1. Provides for the most favored nation treatment of the following Haitian products in Germany: Cabinet and dye woods, cacao, coffee, wax and honey. The following German products imported into Haiti are to be entitled to a reduction of 25 per cent of the principal duty, as

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well as of the surtaxes and other imposts: Hosiery of all kinds, matches, iron and enameled ware, cement, cordage, porcelain ware and twine. Beer is to be admitted at a reduction of two-thirds of the present duty. Ratified by Haiti July 31. *Le moniteur* (Port au Prince) August 26.

31 Japan—Netherlands. Ratifications exchanged at Tokyo of consular convention signed at The Hague, April 27, 1908, *q. v.* *Javasche courant,* August 4.

31 Netherlands. Deposit at Berne of ratification of convention signed at Geneva, July 6, 1906. Wounded in war. *Staatsb.,* 1908, No. 152.

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1 Great Britain. Order in council revoking two orders dated August 11, 1903, and March 27, 1905, which prohibited the importation into the United Kingdom of sugar from Denmark, Russia, Argentine Republic and Spain. *London Ga.,* August 7. This action is in pursuance of the additional act signed August 28, 1907, whereby Great Britain is relieved from the obligation under the sugar convention signed March 5, 1902, to impose a special duty on sugars imported from any foreign country or to prohibit the importation of bounty-fed sugar. Takes effect September 1. *See August 28, 1907* and *March 28, 1908.*

1 Norway—Servia. Ordinary money order exchange service takes effect on basis of the 1906 arrangement signed at Rome. *L'union postale,* 33:127.

1 Denmark—Japan. Telegraphic money order exchange service takes effect. *L'union postale,* 33:127.

3 Third International Art Congress for development of drawing and art teaching and their application to industries opened at London. First congress was held at Paris in 1900; the second at Berne, 1904. Next congress in 1912. Adjourned August 8. *Times,* August 4, 6, 10.

4 Colombia—Holy See. Convention signed at Bogotá amending that signed August 4, 1898, in execution of the concordat signed at Rome, December 31, 1887. *State Papers,* 79:818. Ratified by Colombia, August 15. *Diario oficial,* August 20.

*August, 1908.*

4 FIRST INTERNATIONAL FREE TRADE CONGRESS opened at London. Adjourned August 7. Next congress in 1910 in Belgium or Netherlands. *Times,* August 4 and 8.

6 INTERNATIONAL CONGRESS FOR STUDY OF HISTORICAL SCIENCES opened at Berlin. First congress at The Hague in 1898; second at Paris 1900; third at Rome 1903. Next congress at London in September 1913. *Haskins: The international historical congress at Berlin, American historical R.,* 14:1.

6 JAPAN—UNITED STATES. Ratifications exchanged at Tokyo of treaty signed at Washington, May 19, 1908; ratification advised by the Senate, May 20, 1908; ratified by the President, June 2, 1908; ratified by Japan, August 3, 1908; proclaimed, August 11, 1908. For reciprocal protection in Korea for the inventions, designs, trademarks and copyrights of their respective citizens and subjects. *U. S. Treaty ser.,* No. 506; *Documents, post.*

6 JAPAN—UNITED STATES. Ratifications exchanged at Tokyo of treaty signed at Washington, May 19, 1908; ratification advised by Senate, May 20, 1908; ratified by the President, June 2, 1908; ratified by Japan, August 3, 1908; proclaimed, August 11, 1908. *U. S. Treaty ser.,* No. 507; *Documents, post.* Reciprocal protection in China for inventions, designs, trademarks and copyrights of their respective citizens and subjects. *See May 19, 1908.*

6 JAPAN—RUSSIA. Agreement by exchange of notes at St. Petersburg respecting demarcation of the Russian and Japanese possessions in Sakhalin. *Times,* August 7. *See April 10, 1908.*

7 FIRST INTERNATIONAL CONGRESS ON CONSTITUTIONS at London. *Times,* August 8.

14 FIFTEENTH ORIENTAL CONGRESS opened at Copenhagen. Next congress at Athens in 1911. *Times,* August 25.

16 FOURTH INTERNATIONAL ESPERANTO CONGRESS opened at Dresden. *Forman: The Dresden Esperanto Congress, North American R.,* 188:609. *See August 12, 1907.*

18 SWEDEN—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, May 2, 1908; ratification advised by the Senate, May 6, 1908; ratified by the President, July 6, 1908; ratified by Sweden, June 13, 1908; proclaimed, September 1, 1908. *U. S. Treaty ser.,* No. 508; *Stat. at L.,* vol. 35.

*August, 1908.*

18 PORTUGAL. Chamber approved arbitration treaties with (1) United States, signed at Washington, April 6, 1908; (2) Denmark, signed at Copenhagen, March 20, 1907; (3) Austria-Hungary, signed at Vienna, February 13, 1906; (4) France, signed at Paris, June 26, 1906; (5) Switzerland, signed at Berne, August 18, 1905; (6) Norway and Sweden, signed at Lisbon, May 6, 1905; (7) Great Britain, signed at Windsor, November 16, 1904, and (8) Spain, signed at Lisbon, May 31, 1904.

19 MOROCCO. Abd-el-Aziz defeated near Marrakesh. *De Peyerimhoff: Les forces nouvelles en formation dans l'Afrique du Nord, R. politique et parlementaire,* 57:213; *Ollivier: L'imbroglio marocain, R. d'Europe et d'Amérique,* 20:84; *Morocco — the bombardment of Casablanca, Imperial and Asiatic Quarterly R.,* 26:140; *Germany, Morocco and the powers, Spectator,* September 5; *The Powers and Morocco, id.,* August 29; *Lewis: French operations in Morocco, National R.,* 51:285; *Diercks: Die Marokkofrage und die Konferenz von Algeciras,* Berlin, 1906; *Gutierrez: España y las demas naciones ante la conferencia de Algeciras,* Madrid, 1906; *Blennerhassett: German policy in Morocco, Fortnightly R.,* 84:537.

20 BELGIUM—KONGO. Belgian chamber ratified the Kongo annexation treaty. Ratified by the Senate September 9. *Staatsarchiv,* 75: 120; *B. officiel de l'État indépendant du Congo,* March–April, 1908; *Mém. dipl.,* January 19; *Payen: L'annexion de l'État Indépendent du Congo par la Belgique, Q. dipl.,* 26:269; *Reeves: International beginnings of the Congo Free State,* Baltimore, 1894; *Goffart: Les concessions caoutchoutières du bassin du Congo, La R. générale,* 88:235; *Cd.,* 4135, 4178; *Times,* June 16; *The annexation of the Congo State, Spectator,* August 29; *Morel: The Belgian parliament and the Congo, Contemporary R.,* 94:344; *U. S. Senate doc.* 139, 59 Cong. 2 Sess. Belgium takes over the Kongo, including the former crown domain, subject to the rights of third parties. A special fund of 45,500,000 francs is created to be spent on public works in Belgium, and one of 50,000,000 francs to be spent, subject to ministerial responsibility, on objects connected with the colony. For the amendments of the new colonial law directly affecting the Kongo natives, see *Times,* August 3. *See March 5, 1908. Belgium and the Congo,* Brussels, 1908.

*August, 1908.*

23 MOROCCO. Mulai Hafid proclaimed sultan at Tangier.

24 JAPAN—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, May 5, 1908; ratification advised by the Senate, May 13, 1908; ratified by the President, August 19, 1908; ratified by Japan, July 20, 1908; proclaimed, September 1, 1908. *U. S. Treaty ser.*, No. 509; *Documents, ante,* 2:301. Provides for the submission to The Hague court of all differences "of a legal nature or relating to the interpretation of treaties, which may arise between the two countries and which it may not have been possible to settle by diplomacy." *Stat. at L.*, vol. 35.

26 COLOMBIA—GREAT BRITAIN. Treaty of commerce signed. *Mém. dipl.*, August 30.

26 PORTUGAL. Upper house votes the surtax bill. To facilitate negotiations of commercial treaties.

27 CHINA. Decree acknowledging receipt of a code of constitutional laws drafted by the Department for the Investigation of the principles of Constitutional Government as well as constitutional reform schemes that should be carried into effect before the opening of a parliament. The decree orders the Department to promulgate the said constitutional reform schemes among the heads of the Yamêns in the capital, the viceroys and governors of provinces and their subordinates. The officials are to report to the throne every six months, and nine years are given to carry out the schemes. By that time the constitutional laws will be decided upon, and the date for opening parliament announced. *North China Herald,* 88:599; *Changing and changeless China, Times,* September 16, 1907; *Mém. dipl.*, April 5 and 12, 1908.

31 CHILE—ECUADOR. Treaty of navigation and commerce signed at Santiago. Various Ecuador products, including sugar, coffee and cocoa, will be admitted to Chile free of duty, while Ecuador will grant free entry to saltpetre, guano, cereals and wood from Chile. The two governments agree to seek means of subsidizing a steamer service between Chile and Ecuador. *Times,* September 1.

*September, 1908.*

1 AUSTRIA-HUNGARY—SERVIA. Treaty of commerce signed at Vienna, March 14, 1908, takes effect provisionally until December

*September, 1908.*

31, 1908. Austro-Hungarian order to this effect August 29, 1908. *Reichsgesetzblatt,* 1908, p. 629. The ratifications are to be exchanged under the treaty by December 31, and the treaty to remain in force therefrom until December 31, 1917. The rates of duty on a large number of articles have been reduced by Servia, these reductions being applicable also to imports from the United States under the most favored nation treaty between the United States and Servia. The articles of interest to American commerce on which reductions have been made are as follows: Flour; cotton-seed oil, pure and mixtures of cotton-seed oil with other fatty oils (from $19.33 to $4.83 per 100 kilos); leather boots, shoes and gloves; manufactures of wood, furniture, paper, glassware; manufactures of iron, agricultural implements, safes and electric motors and apparatus. The reductions in the customs tariff of Austria-Hungary affect chiefly cereals, fruits and live stock. These reductions apply also to imports from the United States.

1 TURKEY. Opening ceremonies of the Hedjaz railway at Medina. The railway has been completed to Medina and will be continued to Mecca. *Independent,* September 17; *Geographical J.,* 33:305; *Petermann's Mitteilungen,* Erg. No. 161; *Times,* September 2. The line will eventually be linked up with the Bagdad railway when that line has been carried across the Taurus mountains.

HENRY G. CROCKER.

## ERRATA

### *Errata in the Chronicle of International Events*

Vol. 1.

p. 155. 2 SERVIA—TURKEY. Strike out the entry.

p. 166, line 17. No. 9 should read No. *15.*

p. 167. 8 BRAZIL—NETHERLANDS should read *5.*

p. 173. 16 ITALY—SWITZERLAND should read *13.*

p. 176. 22 ABYSSINIA—ITALY should read *21.*

p. 178. 19 COSTA RICA should read *17.*

p. 179. 8 ABYSSINIA—BELGIUM should read *6.*

p. 492. 24 HONDURAS—NICARAGUA should read *23.*

p. 495, line 12. Treaty ser. 1906 should read *1907.*

line 20. To Q. dipl. add *21:441.*

p. 497. 26 AUSTRIA. Entry should be as of *February* 26.

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|---|---|---|
| p. 759. | 18 | Germany. Entry should be under *1906*. |
| p. 1000. | 9 | France—Spain. Entry should be under *1906*. |
| p. 1005. | 28 | China should read *26*. |
| p. 1006. | 28 | Italy—Russia should read *27*. |
| Vol. 2. | | |
| p. 403. | 29 | Brazil—Colombia. Strike out the sentence mentioning the treaty of St. Ildefonso. On the tenor of the present treaty see *B. del ministerio de rel. ext,* Bogotá, 1:485. |
| p. 661. | 15 | Great Britain—Panama should read *13*. |

## PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

### UNITED STATES[1]

Canadian international boundary. Treaty between the United States and Great Britain. Signed at Washington April 11, 1908; proclaimed July 1, 1908. 15 p. *Dept. of state.*

Chinese, Digest of treaty, laws, and regulations governing the admission of, their residence in, and transit through the United States and its insular possessions. By Frederick D. Cloud. May 5, 1908. 19 p. *Dept. of state.* Paper, 5c.

Chinese, Treaty, laws, and regulations governing the admission of. Regulations approved February 26, 1907. Edition of June, 1908. 62 p. *Bureau of immigration and naturalization.* Paper, 10c.

Fisheries in United States and Canadian waters. Treaty between the United States and Great Britain. Signed at Washington April 11, 1908; proclaimed July 1, 1908. 5 p. *Dept. of state.*

Great Britain, Convention between the United States and. Arbitration. Signed at Washington April 4, 1908; proclaimed June 5, 1908. 5 p. *Dept. of state.*

International fishery congress, [notice of meeting of] 4th congress, Washington, September 22–26, 1908. 7 p. *Bureau of fisheries.*

International law situations, with solutions and notes, 1907. [By George G. Wilson.] 176 p. *Naval war college.* Cloth, 40c.

Italy, Parcels-post convention between the United States and. 1908. 13 p. *Post-office dept.*

Italy, Parcels-post convention with. July 23, 1908. 1 p. *Treasury dept.* (Dept. circular 57, 1908.)

Journals of the Continental Congress, 1774–89. Vols. 11, 12. *Library of congress.* Cloth, $1.00 per volume.

Leyes comerciales y maritimas de la América Latina comparadas entre sí y con los códigos de España y los leyes de los Estados Unidos de

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[1] When prices are given, the documents in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

América, profusamente anotadas con la legislación de España y con la jurisprudencia extranjera: por Clifford Stevens Walton. 1907. 5 v. *Dept. of state.* Cloth, v. 1, 2, each $1.00; v. 3, $1.20; v. 4, 5, each 75c.

Mexico, Convention between the United States and. Arbitration. Signed at Washington March 24, 1908; proclaimed June 29, 1908. 5 p. *Dept. of state.*

Netherlands, Convention between the United States and the, concerning the exchange of parcels by parcel-post. 1908. 8 p. *Post-office dept.*

Netherlands, Parcels-post convention with the. July 1, 1908. 1 p. *Treasury dept.* (Dept. circular 51, 1908.)

Norway, Convention between the United States and. Arbitration. Signed at Washington April 4, 1908; proclaimed June 29, 1908. 5 p. *Dept. of state.*

San Marino, Treaty between the United States and the Republic of. Extradition. Signed at Rome January 10, 1906; proclaimed June 12, 1908. 11 p. *Dept. of state.*

Spain, Convention between the United States and. Arbitration. Signed at Washington April 20, 1908; proclaimed June 3, 1908. 5 p. *Dept. of state.*

Spain, Treaty and protocol between the United States and. Extradition. Signed at Madrid June 15, 1904; proclaimed May 21, 1908. 13 p. *Dept. of state.*

Uruguay, Parcel-post convention between the United States and. 1908. 12 p. *Post-office dept.*

Uruguay, Treaty between the United States and. Extradition. Signed at Washington March 11, 1905; proclaimed July 10, 1908. 10 p. *Dept. of state.*

### GREAT BRITAIN[2]

Aliens, Second annual report of H. M. inspector and statement with regard to the expulsion of. For 1907. (cd. 4102.) 8d.

Canada, Report of Mr. W. L. Mackenzie King on his mission to England in connection with the immigration of Asiatics into. 1908. *Colonial office.* (cd. 4118.) 1d.

Commercial treaties, Return showing countries between which, were in force on January 1, 1908. *Foreign office.* (cd. 4080.) 5½d.

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[2] Official publications of Great Britain, India, and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, Eng.

Congo, Independent State of the, Further correspondence respecting the. [June, 1907, to April, 1908.] *Foreign office.* (cd. 4079.) 2½d.

Congo State, Correspondence respecting the taxation of natives, and other questions, in the. 1908. *Foreign office.* (cd. 4135.) 4½d.

Egypt and the Soudan, Reports by H. M. agent and consul-general on the finances, administration, and condition of, in 1907. *Foreign office.* (cd. 3966.) 7½d.

France, Agreement between the United Kingdom and, respecting death duties. Signed at London November 15, 1907. *Foreign office.* (cd. 3965.) ½d.

Industrial property convention of 1883, Accession of the colony of Trinidad and Tobago to the, as modified by the additional act of 1900. May 14, 1908. *Foreign office.* (cd. 3967.) ½d.

International sugar commission, Report of the British delegate to the, upon a special session called to consider an application from the Italian Government on March 26, 1908. *Foreign office.* (cd. 4077.) ½d.

International sugar convention of March 5, 1902, Protocol recording accession of Russia to the, and additional act of August 28, 1907. Signed at Brussels December 10, 1907. *Foreign office.* (cd. 3968.) 2d.

Panama, Parcel-post agreement between the United Kingdom and. Signed at Panama April 13, 1908. *Foreign office.* (cd. 4136.) 1d.

Paraguay, Declaration between the United Kingdom and, amending the treaty of commerce of October 16, 1884. Signed at Asuncion March 14, 1908. *Foreign office.* (cd. 4134.) ½d.

Peace conference, Protocols of the eleven plenary meetings of the second, held at The Hague in 1907. With annexes. *Foreign office.* (cd. 4081.) 4s. 5d.

Servia, Treaty of commerce between the United Kingdom and. Signed at Belgrade February 17, 1907. *Foreign office.* (cd. 4078.) 2d.

South-eastern Europe, Further correspondence respecting the affairs of. [January, 1907, to April, 1908.] *Foreign office.* (cd. 4076.) 2s. 3d.

Spain, Agreement between the United Kingdom and, amending article 5 of the agreement of November 25, 1875, respecting the postal service between Gibraltar and Spain. Signed at Madrid April 9, 1908. *Foreign office.* (cd. 4137.) ½d.

### BRAZIL

Mensagem apresentada ao Congresso nacional. 1908. 60 p. ***Presidente.***

### CHILE

Informaciones consulares por Waldo Diaz U., Consul de Chile en Chiclayo [Perú]. 1908. 172 p. *Ministerio de relaciones exteriores.*

### COSTA RICA

Mensaje del Señor Presidente de la republica presentado al Congreso constitucional. 1908. xxxvii. p.

### DENMARK

*Internationale fredskonference.* General — rapport fra den Danske delegation ved den i Haag i 1907 afholdte 2 Internationale fredskonference. 1908. 249, 12 p.

### FRANCE[3]

Affaires étrangères, Ministère des. Compte définitif des dépenses de l'exercice 1905. 98 p. *Ministère des affaires étrangères.*

Affaires étrangères, Ministère des. Projet de loi présenté à la Chambre des députés portant fixation du budget général de l'exercice 1908. p. 231–282.

Affaires étrangères, Ministère des. Rapport fait au nom de la Commission du budget chargée d'examiner le projet de loi portant fixation de budget général de l'exercice 1908. 2 v. xiii, 244, viii, 496 p. *Chambre des députés.*

Espagne, 1907. Documents diplomatiques. 10 p. *Ministère des affaires étrangères.*

Macedoine, Affaires de. Élévation des droits de douane en Turquie. 1906–1907. Documents diplomatiques. vii, 123 p. *Ministère des affaires étrangères.*

Maroc, Affaires du, III. 1906–1907. Documents diplomatiques. xix, 405 p. *Ministère des affaires étrangères.*

Protectorats. Rapport fait au nom de la Commission du budget chargée d'examiner le projet de loi portant fixation du budget général de l'exercice 1908. 109 p., map. *Chambre des députés.*

### HONDURAS

Nicaragua, El arbitraje entre Honduras y. Rectificacion documentada. 1908. 236 p., maps. *Ministerio de relaciones exteriores.*

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[3] Official publications of France may be purchased of Georges Roustan, 5 Quai Voltaire, 7e, Paris, France.

### NETHERLANDS

Conférence internationale de la paix, Deuxième. La Haye 15 juin–18 octobre 1907. Actes et documents. Tome premier. Séances plénières de la conférence. La Haye, 1907. xvii, 723 p. *Ministères des affaires étrangères.*

### PARAGUAY

Immigracion y colonizacion, Memoria de la oficina general de, 1905–6—1906–7. Asunción, 1908. 105 p. *Ministerio de relaciones exteriores.*

### SALVADOR

Relaciones exteriores, justicia y beneficencia, Memoria de los actos del ejecutivo en los ramos de. 1906. 436 p.

PHILIP DE WITT PHAIR.

# JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

(Decisions of the Permanent Court of Arbitration at The Hague, organized under the convention of July 29, 1899, for the peaceful adjustment of international disputes.)

## THE UNITED STATES OF AMERICA V. THE UNITED MEXICAN STATES

### *Protocol of an agreement between the United States and the Republic of Mexico for the adjustment of certain contentions arising under what is known as "The Pious Fund of the Californias"*

[Signed at Washington, May 22, 1902.]

Whereas, under and by virtue of the provisions of a convention entered into between the High Contracting Parties above named, of date July 4, 1868, and subsequent conventions supplementary thereto, there was submitted to the Mixed Commission provided for by said convention a certain claim advanced by and on behalf of the prelates of the Roman Catholic Church of California against the Republic of Mexico for an annual interest upon a certain fund known as "The Pious Fund of the Californias," which interest was said to have accrued between February 2, 1848, the date of the signature of the Treaty of Guadalupe Hidalgo, and February 1, 1869, the date of the exchange of the ratifications of said convention above referred to; and

Whereas, said Mixed Commission, after considering said claim, the same being designated as No. 493 upon its docket, and entitled Thaddeus Amat, Roman Catholic Bishop of Monterey, a corporation sole, and Joseph S. Alemany, Roman Catholic Bishop of San Francisco, a corporation sole, against the Republic of Mexico, adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of nine hundred and four thousand seven hundred and 99/100 (904,700.99) dollars; the same, as expressed in the findings of said court, being for twenty-one years' interest of the annual amount of forty-three thousand and eighty and 99/100 (43,080.99) dollars upon seven hundred and eighteen thousand and sixteen and 50/100 (718,016.50) dollars, said award being in Mexican gold dollars, and the said amount of nine hundred and four thousand seven hundred and 99/100 (904,700.99) dollars having been fully paid and discharged in accordance with the terms of said convention; and

Whereas, the United States of America on behalf of said Roman Catholic Bishops, above named, and their successors in title and interest, have since such award claimed from Mexico further installments of said interest, and have insisted that the said claim was conclusively established, and its amount fixed as against Mexico and in favor of said original claimants and their successors in title and interest under the said first-mentioned convention of 1868 by force of the said award as *res judicata;* and have further contended that apart from such former award their claim against Mexico was just, both of which propositions are controverted and denied by the Republic of Mexico, and the High Contracting Parties hereto, animated by a strong desire that the dispute so arising may be amicably, satisfactorily and justly settled, have agreed to submit said controversy to the determination of arbitrators, who shall, unless otherwise herein expressed, be controlled by the provisions of the international convention for the pacific settlement of international disputes, commonly known as the Hague convention, and which arbitration shall have power to determine:

1. If said claim, as a consequence of the former decision, is within the governing principle of *res judicata;* and
2. If not, whether the same be just.

And to render such judgment or award as may be meet and proper under all the circumstances of the case.

It is therefore agreed by and between the United States of America, through their representative, John Hay, Secretary of State of the United States of America, and the Republic of Mexico, through its representative, Manuel de Azpiroz, Ambassador Extraordinary and Plenipotentiary to the United States of America for the Republic of Mexico, as follows:

## I

That the said contentions be referred to the special tribunal hereinafter provided, for examination, determination and award.

## II

The special tribunal hereby constituted shall consist of four arbitrators (two to be named by each of the High Contracting Parties) and an umpire to be selected in accordance with the provisions of the Hague convention. The arbitrators to be named hereunder shall be signified by each of the High Contracting Parties to the other within sixty days after the date of this protocol. None of those so named shall be a native or citizen of the parties hereto. Judgment may be rendered by a majority of said court.

All vacancies occurring among the members of said court because of death, retirement or disability from any cause before a decision shall be reached, shall be filled in accordance with the method of appointment of the member affected as provided by said Hague convention, and if occurring after said court shall have first assembled, will authorize in the judgment of the court an extension of time for hearing or judgment, as the case may be, not exceeding thirty days.

### III

All pleadings, testimony, proofs, arguments of counsel and findings or awards of commissioners or umpire, filed before or arrived at by the Mixed Commission above referred to, are to be placed in evidence before the court hereinbefore provided for, together with all correspondence between the two countries relating to the subject-matter involved in this arbitration; originals or copies thereof duly certified by the Departments of State of the High Contracting Parties being presented to said new tribunal. Where printed books are referred to in evidence by either party, the party offering the same shall specify volume, edition and page of the portions desired to be read, and shall furnish the court in print the extracts relied upon; their accuracy being attested by affidavit. If the original work is not already on file as a portion of the record of the former Mixed Commission, the book itself shall be placed at the disposal of the opposite party in the respective offices of the Secretary of State or of the Mexican Ambassador in Washington, as the case may be, thirty days before the meeting of the tribunal herein provided for.

### IV

Either party may demand from the other the discovery of any fact or of any document deemed to be or to contain material evidence for the party asking it; the document desired to be described with sufficient accuracy for identification, and the demanded discovery shall be made by delivering a statement of the fact or by depositing a copy of such document (certified by its lawful custodian, if it be a public document, and verified as such by the possessor, if a private one), and the opposite party shall be given the opportunity to examine the original in the City of Washington at the Department of State, or at the office of the Mexican Ambassador, as the case may be. If notice of the desired discovery be given too late to be answered ten days before the tribunal herein provided for shall sit for hearing, then the answer desired thereto shall be filed with or documents produced before the court herein provided for as speedily as possible.

## V

Any oral testimony additional to that in the record of the former arbitration may be taken by either party before any judge, or clerk of court of record, or any notary public, in the manner and with the precautions and conditions prescribed for that purpose in the rules of the Joint Commission of the United States of America and the Republic of Mexico, as ordered and adopted by that tribunal August 10, 1869, and so far as the same may be applicable. The testimony when reduced to writing, signed by the witness, and authenticated by the officer before whom the same is taken, shall be sealed up, addressed to the court constituted hereby, and deposited so sealed up in the Department of State of the United States, or in the Department of Foreign Relations of Mexico, to be delivered to the court herein provided for when the same shall convene.

## VI

Within sixty days from the date hereof the United States of America, through their agent or counsel, shall prepare and furnish to the Department of State aforesaid, a memorial in print of the origin and amount of their claim, accompanied by references to printed books, and to such portions of the proofs or parts of the record of the former arbitration, as they rely on in support of their claim, delivering copies of the same to the Embassy of the Republic of Mexico in Washington, for the use of the agent or counsel of Mexico.

## VII

Within forty days after the delivery thereof to the Mexican Embassy the agent or counsel for the Republic of Mexico shall deliver to the Department of State of the United States of America in the same manner and with like references a statement of its allegations and grounds of opposition to said claim.

## VIII

The provisions of Paragraphs VI and VII shall not operate to prevent the agents or counsel for the parties hereto from relying at the hearing or submission upon any documentary or other evidence which may have become open to their investigation and examination at a period subsequent to the times provided for service of memorial and answer.

## IX

The first meeting of the arbitral court hereinbefore provided for shall take place for the selection of an umpire on September 1, 1902, at The Hague, in the quarters which may be provided for such purpose by the International Bureau at The Hague, constituted by virtue of the Hague convention hereinbefore referred to, and for the commencement of its hearings September 15, 1902, is designated, or if an umpire may not be selected by said date, then as soon as possible thereafter, and not later than October 15, 1902, at which time and place and at such other times as the court may set (and at Brussels if the court should determine not to sit at The Hague) explanations and arguments shall be heard or presented as the court may determine, and the cause be submitted. The submission of all arguments, statements of facts, and documents shall be concluded within thirty days after the time provided for the meeting of the court for hearing (unless the court shall order an extension of not to exceed thirty days) and its decision and award announced within thirty days after such conclusion, and certified copies thereof delivered to the agents or counsel of the respective parties and forwarded to the Secretary of State of the United States and the Mexican Ambassador at Washington, as well as filed with the Netherland Minister for Foreign Affairs.

## X

Should the decision and award of the tribunal be against the Republic of Mexico, the findings shall state the amount and in what currency the same shall be payable, and shall be for such amount as under the contentions and evidence may be just. Such final award, if any, shall be paid to the Secretary of State of the United States of America within eight months from the date of its making.

## XI

The agents and counsel for the respective parties may stipulate for the admission of any facts, and such stipulation, duly signed, shall be accepted as proof thereof.

### XII

Each of the parties hereto shall pay its own expenses, and one-half of the expenses of the arbitration, including the pay of the arbitrators; but such costs shall not constitute any part of the judgment.

### XIII

Revision shall be permitted as provided in Article LV of the Hague convention, demand for revision being made within eight days after announcement of the award. Proofs upon such demand shall be submitted within ten days after revision be allowed (revision only being granted, if at all, within five days after demand therefor) and counterproofs within the following ten days, unless further time be granted by the court. Arguments shall be submitted within ten days after the presentation of all proofs, and a judgment or award given within ten days thereafter. All provisions applicable to the original judgment or award shall apply as far as possible to the judgment or award on revision. *Provided* that all proceedings on revision shall be in the French language.

### XIV

The award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration.

Done in duplicate in English and Spanish at Washington, this 22d day of May, A. D. 1902.

JOHN HAY [SEAL.]
M. DE AZPIROZ [SEAL.]

## *Decision of the Permanent Court of Arbitration in the Matter of the Pious Fund, October 14, 1902*

The Tribunal of Arbitration constituted by virtue of the treaty concluded at Washington May 22, 1902, between the United States of America and the United Mexican States:

Whereas, by a *compromis* (agreement of arbitration) prepared under the form of protocol between the United States of America and the United Mexican States, signed at Washington, May 22, 1902, it was agreed and determined that the differences which existed between the United States of America and the United Mexican States relative to the subject of the "Pious Fund of the Californias," the annuities of which were claimed by the United States of America for the benefit of the

Archbishop of San Francisco and the Bishop of Monterey, from the Government of the Mexican Republic, should be submitted to a tribunal of arbitration, constituted upon the basis of the convention for the pacific settlement of international disputes, signed at The Hague July 29, 1899, which should be composed in the following manner — that is to say:

The President of the United States of America should designate two arbitrators (nonnationals) and the President of the United Mexican States equally two arbitrators (nonnationals); these four arbitrators should meet September 1, 1902, at The Hague, for the purpose of nominating the umpire, who at the same time should be of right the president of the Tribunal of Arbitration.

Whereas the President of the United States of America named as arbitrators:

The Right Hon. Sir Edward Fry, LL. D., former member of the Court of Appeals, member of the Privy Council of His Britannic Majesty, member of the Permanent Court of Arbitration; and

His Excellency M. De Martens, LL. D., Privy Councilor, member of the Council of the Imperial Ministry of Foreign Affairs of Russia, member of the Institute of France, member of the Permanent Court of Arbitration.

Whereas the President of the United Mexican States named as arbitrators:

Mr. T. M. C. Asser, LL. D., member of the Council of State of the Netherlands, former professor at the University of Amsterdam, member of the Permanent Court of Arbitration; and

Jonkheer A. F. de Savornin Lohman, LL. D., former Minister of the Interior of the Netherlands, former professor at the Free University at Amsterdam, member of the second chamber of the States-General, member of the Permanent Court of Arbitration; which arbitrators at their meeting, September 1, 1902, elected, conformably to articles 32–34 of the convention of The Hague of July 29, 1899, as umpire and president of right of the Tribunal of Arbitration,

Mr. Henning Matzen, LL. D., professor at the University of Copenhagen, Councilor Extraordinary to the Supreme Court, President of the Landsthing, member of the Permanent Court of Arbitration; and

Whereas, by virtue of the protocol of Washington of May 22, 1902, the above-named arbitrators, united in tribunal of arbitration, were required to decide:

1. If the said claim of the United States of America for the benefit of

the Archbishop of San Francisco and the Bishop of Monterey was within the governing principle of *res judicata* by virtue of the arbitral sentence of November 11, 1875, pronounced by Sir Edward Thornton, as umpire.

2. If not, whether the said claim was just, with power to render such judgment as would seem to them just and equitable.

Whereas, the above-named arbitrators having examined with impartiality and care all the documents and papers presented to the tribunal of arbitration by the agents of the United States of America and of the United Mexican States, and having heard with the greatest attention the oral arguments presented before the tribunal by the agents and the counsel of the two parties in litigation;

Considering that the litigation submitted to the decision of the Tribunal of Arbitration consists in a conflict between the United States of America and the United Mexican States which can only be decided upon the basis of international treaties and the principles of international law;

Considering that the international treaties concluded from the year 1848 to the *compromis* of May 22, 1902, between the two Powers in litigation manifest the eminently international character of this conflict;

Considering that all the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and that they all serve to render precise the meaning and the bearing of the *dispositif* (decisory part of the judgment) and to determine the points upon which there is *res judicata* and which thereafter can not be put in question;

Considering that this rule applies not only to the judgments of tribunals created by the state, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the *compromis;*

Considering that this same principle should for a still stronger reason be applied to international arbitration;

Considering that the convention of July 4, 1868, concluded between the two States in litigation, had accorded to the Mixed Commission named by these States, as well as to the umpire to be eventually designated, the right to pass upon their own jurisdiction;

Considering that in the litigation submitted to the decision of the Tribunal of Arbitration, by virtue of the *compromis* of May 22, 1902, there is not only identity of parties to the suit, but also identity of subject-matter, compared with the arbitral sentence of Sir Edward Thornton, as umpire, in 1875, and amended by him October 24, 1876;

Considering that the Government of the United Mexican States conscientiously executed the arbitral sentence of 1875 and 1876 by paying the annuities adjudged by the umpire;

Considering that since 1869 thirty-three annuities have not been paid by the Government of the United Mexican States to the Government of the United States of America, and that the rules of prescription, belonging exclusively to the domain of civil law, can not be applied to the present dispute between the two States in litigation;

Considering, so far as the money is concerned in which the annual payment should take place, that the silver dollar having legal currency in Mexico, payment in gold can not be exacted, except by virtue of an express stipulation;

Considering that in the present instance such stipulation not existing, the party defendant has the right to free itself by paying in silver; that with relation to this point the sentence of Sir Edward Thornton has not the force of *res judicata*, except for the twenty-one annuities with regard to which the umpire decided that the payment should take place in Mexican gold dollars, because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence;

Considering that according to article 10 of the protocol of Washington of May 22, 1902, the present Tribunal of Arbitration must determine, in case of an award against the Republic of Mexico, in what money payment must take place;

For these reasons the Tribunal of Arbitration decides and unanimously pronounces as follows:

1. That the said claim of the United States of America for the benefit of the Archbishop of San Francisco and of the Bishop of Monterey is governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton, of November 11, 1875; amended by him October 24, 1876.
2. That conformably to this arbitral sentence the Government of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of $1,420,682.67 Mexican, in money having legal currency in Mexico, within the period fixed by article 10 of the protocol of Washington of May 22, 1902.

This sum of $1,420,682.67 will totally extinguish the annuities accrued and not paid by the Government of the Mexican Republic — that is to say, the annuity of $43,050.99 Mexican from February 2, 1869, to February 2, 1902.

3. The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on February 2, 1903, and each following year on the same date of February 2, perpetually, the annuity of $43,050.99 Mexican, in money having legal currency in Mexico.

Done at The Hague in the hotel of the Permanent Court of Arbitration in triplicate original, October 14, 1902.

HENNING MATZEN.
EDW. FRY.
MARTENS.
T. M. C. ASSER.
A. F. DE SAVORNIN LOHMAN.

## GERMANY, GREAT BRITAIN, AND ITALY V. VENEZUELA ET AL

### *Protocol between Germany and Venezuela relating to the settlement of the German claims* [1]

[Signed at Washington, February 13, 1903.]

Whereas certain differences have arisen between Germany and the United States of Venezuela in connection with the claims of German subjects against the Venezuelan Government, the undersigned, Baron Speck von Sternburg, His Imperial German Majesty's Envoy Extraordinary and Minister Plenipotentiary, duly authorized by the Imperial German Government, and Mr. Herbert W. Bowen, duly authorized by the Government of Venezuela, have agreed as follows:

#### ARTICLE 1

The Venezuelan Government recognize in principle the justice of the claims of German subjects presented by the Imperial German Government.

#### ARTICLE 2

The German claims originating from the Venezuelan civil wars of 1898 to 1900 amount to 1,718,815.67 bolivares. The Venezuelan Government undertake to pay of said amount immediately in cash the sum of £5,500 = 137,500 bolivares (five thousand five hundred pounds; one hundred thirty-seven thousand five hundred bolivares) and for the payment of the rest to redeem five bills of exchange for the corresponding installments payable on the 15th of March, the 15th of April, the 15th of May, the 15th of June, and the 15th of July, 1903, to the Imperial German diplomatic agent in Caracas. These bills shall be drawn immediately by Mr. Bowen and handed over to Baron Sternburg.

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[1] Identical protocols were concluded by Great Britain and Italy with Venezuela.

Should the Venezuelan Government fail to redeem one of these bills, the payment shall be made from the customs receipts of La Guayra and Puerto Cabello, and the administration of both ports shall be put in charge of Belgian custom-house officials until the complete extinction of the said debts.

### ARTICLE 3

The German claims not mentioned in articles 2 and 6, in particular the claims resulting from the present Venezuelan civil war, the claims of the Great Venezuelan Railroad Company against the Venezuelan Government for passages and freight, the claims of the engineer Carl Henkel in Hamburg and of the Beton and Monierbau Company (Limited) in Berlin for the construction of a slaughterhouse at Caracas, are to be submitted to a Mixed Commission.

Said commission shall decide both whether the different claims are materially well founded and also upon their amount. The Venezuelan Government admit their liability in cases where the claim is for injury to, or wrongful seizure of, property and consequently the commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due.

### ARTICLE 4

The Mixed Commission mentioned in article 3 shall have its seat in Caracas. It shall consist of two members, one of which is to be appointed by the Imperial German Government, the other by the Government of Venezuela. The appointments are to be made before May 1st, 1903. In each case where the two members come to an agreement on the claims their decision shall be considered as final; in cases of disagreement the claims shall be submitted to the decision of an umpire to be nominated by the President of the United States of America.

### ARTICLE 5

For the purpose of paying the claims specified in article 3 as well as similar claims preferred by other powers the Venezuelan Government shall remit to the representative of the Bank of England in Caracas in monthly installments, beginning from March 1st, 1903, 30 per cent of the customs revenues of La Guayra and Pureto Cabello, which shall not be alienated to any other purpose. Should the Venezuelan Government fail to carry out this obligation Belgian customs officials shall be placed in charge of the customs of the two ports and shall administer them until the liabilities of the Venezuelan Government in respect to the above-mentioned claims shall have been discharged.

Any questions as to the distribution of the customs revenues specified in the foregoing paragraph, as well as to the rights of Germany, Great Britain, and Italy to a separate payment of their claims, shall be determined, in default of another agreement, by the Permanent Tribunal of Arbitration at The Hague. All other powers interested may join as parties in the arbitration proceedings against the above-mentioned three powers.

### ARTICLE 6

The Venezuelan Government undertake to make a new satisfactory arrangement to settle simultaneously the 5 per cent Venezuelan loan of 1896, which is chiefly in German hands, and the entire exterior debt. In this arrangement the State revenues to be employed for the service of the debt are to be determined without prejudice to the obligations already existing.

### ARTICLE 7

The Venezuelan men-of-war and merchant vessels captured by the German naval forces shall be returned to the Venezuelan Government in their actual condition. No claims for indemnity can be based on the capture and on the holding of these vessels, neither will an indemnity be granted for injury to or destruction of the same.

### ARTICLE 8

Immediately upon the signature of this protocol the blockade of the Venezuelan ports shall be raised by the Imperial German Government in concert with the Governments of Great Britain and Italy. Also the diplomatic relations between the Imperial German and the Venezuelan Government will be resumed.

Done in duplicate in German and English texts at Washington this thirteenth day of February, one thousand nine hundred and three.

(Signed) STERNBURG.
(Signed) HERBERT W. BOWEN.

## *Protocol between Germany and Venezuela for the reference of certain questions to the Permanent Court of Arbitration at The Hague*[1]

[Signed at Washington, May 7, 1903.]

Whereas protocols have been signed between Germany, Great Britain, Italy, the United States of America, France, Spain, Belgium, the Netherlands, Sweden and Norway, and Mexico, on the one hand, and Venezuela on the other hand, containing certain conditions agreed upon for the settlement of claims against the Venezuelan Government;

And whereas certain further questions arising out of the action taken by the Governments of Germany, Great Britain, and Italy, in connection with the settlement of their claims, have not proved to be susceptible of settlement by ordinary diplomatic methods;

And whereas the powers interested are resolved to determine these questions by reference to arbitration in accordance with the provisions of the convention for the pacific settlement of international disputes, signed at The Hague on the 29th July, 1899;

Venezuela and Germany have, with a view to carry out that resolution, authorized their representatives, that is to say:

Mr. Herbert W. Bowen as plenipotentiary of the Government of Venezuela, and

The Imperial German Minister, Baron Speck von Sternburg, as representative of the Imperial German Government, to conclude the following agreement:

### ARTICLE I

The question as to whether or not Germany, Great Britain, and Italy are entitled to preferential or separate treatment in the payment of their claims against Venezuela shall be submitted for final decision to the tribunal at The Hague.

Venezuela having agreed to set aside 30 per cent of the customs revenues of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the tribunal at The Hague shall decide how the said revenues shall be divided between the blockading powers, on the one hand, and the other creditor powers, on the other hand, and its decision shall be final.

If preferential or separate treatment is not given to the blockading powers, the tribunal shall decide how the said revenue shall be distributed among all the creditor powers, and the parties hereto agree that the tribunal, in that case, shall consider, in connection with the payment of the claims out of the 30 per cent, any preference or pledges of revenue enjoyed by any of the creditor powers, and shall accordingly decide the question of distribution, so that no power shall obtain preferential treatment, and its decision shall be final.

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[1] Identical protocols were concluded by Great Britain and Italy with Venezuela.

### ARTICLE II

The facts on which shall depend the decision of the questions stated in Article I shall be ascertained in such manner as the tribunal may determine.

### ARTICLE III

The Emperor of Russia shall be invited to name and appoint from the members of the Permanent Court of The Hague three arbitrators to constitute the tribunal which is to determine and settle the questions submitted to it under and by virtue of this agreement.

None of the arbitrators so appointed shall be a subject or citizen of any of the signatory or creditor powers.

This tribunal shall meet on the 1st day of September, 1903, and shall render its decision within six months thereafter.

### ARTICLE IV

The proceedings shall be carried on in the English language, but arguments may, with the permission of the tribunal, be made in any other language also.

Except as herein otherwise stipulated, the procedure shall be regulated by the convention of The Hague of July 29th, 1899.

### ARTICLE V

The tribunal shall, subject to the general provision laid down in article 57 of the international convention of July 29, 1899, also decide how, when, and by whom the costs of this arbitration shall be paid.

### ARTICLE VI

Any nation having claims against Venezuela may join as a party in the arbitration provided for by this agreement.

Done in duplicate at Washington this seventh day of May, one thousand nine hundred and three.

(Signed) HERBERT W. BOWEN.
(Signed) STERNBURG.

### *Decision of the Permanent Court of The Hague, February 22, 1904*

The Tribunal of Arbitration, constituted in virtue of the protocols signed at Washington on May 7, 1903, between Germany, Great Britain, and Italy on the one hand and Venezuela on the other hand;

Whereas other protocols were signed to the same effect by Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway, and the United States of America on the one hand and Venezuela on the other hand;

Whereas all these protocols declare the agreement of all the contracting parties with reference to the settlement of the claims against the Venezuelan Government;

Whereas certain further questions, arising out of the action of the Governments of Germany, Great Britain, and Italy concerning the settlement of their claims, were not susceptible of solution by the ordinary diplomatic methods;

Whereas the powers interested decided to solve these questions by submitting them to arbitration, in conformity with the dispositions of the convention signed at The Hague on July 29, 1899, for the pacific settlement of international disputes;

Whereas in virtue of Article III of the protocols of Washington of May 7, 1903, His Majesty the Emperor of Russia was requested by all the interested powers to name and appoint from among the members of the Permanent Court of Arbitration of The Hague three arbitrators who shall form the tribunal of arbitration charged with the solution and settlement of the questions which shall be submitted to it in virtue of the above-named protocols;

Whereas none of the arbitrators thus named could be a citizen or subject of any one of the signatory or creditor powers, and whereas the tribunal was to meet at The Hague on September 1, 1903, and render its award within a term of six months;

His Majesty the Emperor of Russia, conforming to the request of all the signatory powers of the above-named protocols of Washington of May 7, 1903, graciously named as arbitrators the following members of the Permanent Court of Arbitration:

His Excellency Mr. N. V. Mourawieff, Secretary of State of His Majesty the Emperor of Russia, Actual Privy Councilor, Minister of Justice and Procurator of the Russian Empire,

Mr. H. Lammasch, Professor of Criminal and of International Law at the University of Vienna, member of the Upper House of the Austrian Parliament, and

His Excellency Mr. F. de Martens, Doctor of Law, Privy Councilor, permanent member of the Council of the Russian Ministry of Foreign Affairs, member of the "Institut de France;"

Whereas by unforeseen circumstances the Tribunal of Arbitration could not be definitely constituted till October 1, 1903, the arbitrators at their first meeting on that day, proceeding in conformity with Article XXXIV of the convention of July 29, 1899, to the nomination of the president of the tribunal, elected as such His Excellency Mr. Mourawieff, Minister of Justice;

And whereas in virtue of the protocols of Washington of May 7, 1903, the above-named arbitrators, forming the legally constituted Tribunal of Arbitration, had to decide, in conformity with Article I of the protocols of Washington of May 7, 1903, the following points:

> The question as to whether or not Germany, Great Britain, and Italy are entitled to preferential or separate treatment in the payment of their claims against Venezuela, and its decision shall be final.
>
> Venezuela having agreed to set aside 30 per cent of the customs revenues of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the tribunal at The Hague shall decide how the said revenues shall be divided between the blockading powers on the one hand and the other creditor powers on the other hand, and its decision shall be final.
>
> If preferential or separate treatment is not given to the blockading powers, the tribunal shall decide how the said revenue shall be distributed among all the creditor powers, and the parties hereto agree that the tribunal, in that case, shall consider, in connection with the payment of the claims out of the 30 per cent, any preference or pledges of revenues enjoyed by any of the creditor powers, and shall accordingly decide the question of distribution, so that no power shall obtain preferential treatment, and its decision shall be final.

Whereas the above-named arbitrators, having examined with impartiality and care all the documents and acts presented to the Tribunal of Arbitration by the agents of the powers interested in this litigation, and having listened with the greatest attention to the oral pleadings delivered before the tribunal by the agents and counsel of the parties to the litigation;

Whereas the tribunal, in its examination of the present litigation, had to be guided by the principles of international law and the maxims of justice;

Whereas the various protocols signed at Washington since February

13, 1903, and particularly the protocols of May 7, 1903, the obligatory force of which is beyond all doubt, form the legal basis for the arbitral award;

Whereas the tribunal has no competence at all either to contest the jurisdiction of the Mixed Commissions of Arbitration established at Caracas, or to judge their action;

Whereas the tribunal considers itself absolutely incompetent to give a decision as to the character or the nature of the military operations undertaken by Germany, Great Britain, and Italy against Venezuela;

Whereas also the Tribunal of Arbitration was not called upon to decide whether the three blockading powers had exhausted all pacific methods in their dispute with Venezuela in order to prevent the employment of force;

And it can only state the fact that since 1901 the Government of Venezuela categorically refused to submit its dispute with Germany and Great Britain to arbitration, which was proposed several times and especially by the note of the German Government of July 16, 1901;

Whereas after the war between Germany, Great Britain, and Italy on the one hand and Venezuela on the other hand no formal treaty of peace was concluded between the belligerent powers;

Whereas the protocols, signed at Washington on February 13, 1903, had not settled all the questions in dispute between the belligerent parties, leaving open in particular the question of the distribution of the receipts of the customs of La Guayra and Puerto Cabello;

Whereas the belligerent powers, in submitting the question of preferential treatment in the matter of these receipts to the judgment of the Tribunal of Arbitration, agreed that the arbitral award should serve to fill up this void to insure the definite re-establishment of peace between them;

Whereas on the other hand the warlike operations of the three great European powers against Venezuela ceased before they had received satisfaction on all their claims, and on the other hand the question of preferential treatment was submitted to arbitration, the tribunal must recognize in these facts precious evidence in favor of the great principle of arbitration in all phases of international disputes;

Whereas the blockading powers, in admitting the adhesion to the stipulations of the protocols of February 13, 1903, of the other powers which had claims against Venezuela, could evidently not have the intention of renouncing either their acquired rights or their actual privileged position;

Whereas the Government of Venezuela, in the protocols of February 13, 1903, (Article I) itself recognizes *"in principle the justice of the claims"* presented to it by the Governments of Germany, Great Britain, and Italy;

While in the protocol signed betwen Venezuela and the so-called neutral or pacific powers the justice of the claims of these latter was not recognized in principle;

Whereas the Government of Venezuela, until the end of January, 1903, in no way protested against the pretension of the blockading powers to insist on special securities for the settlement of their claims;

Whereas Venezuela itself during the diplomatic negotiations always made a formal distinction between "the allied powers" and "the neutral powers;"

Whereas the neutral powers, who now claim before the Tribunal of Arbitration equality in the distribution of the 30 per cent of the customs receipts of La Guayra and Puerto Cabello, did not protest against the pretensions of blockading powers to a preferential treatment either at the moment of the cessation of the war against Venezuela or immediately after the signature of the protocols of February 13, 1903;

Whereas it appears from the negotiations which resulted in the signature of the protocols of February 13 and May 7, 1903, that the German and British Governments constantly insisted on their being given guaranties for *"a sufficient and punctual discharge of the obligations"* (British memorandum of December 23, 1902, communicated to the Government of the United States of America);

Whereas the plenipotentiary of the Government of Venezuela accepted this reservation on the part of the allied powers without the least protest;

Whereas the Government of Venezuela engaged, with respect to the allied powers alone, to offer special guaranties for the accomplishment of its engagements;

Whereas the good faith which ought to govern international relations imposes the duty of stating that the words *"all claims"* used by the representative of the Government of Venezuela in his conferences with the representatives of the allied powers (statement left in the hands of Sir Michael Herbert by Mr. H. Bowen of January 23, 1903) could only mean the claims of these latter and could only refer to them;

Whereas the neutral powers, having taken no part in the warlike operations against Venezuela, could in some respects profit by the circumstances created by those operations, but without acquiring any new rights;

Whereas the rights acquired by the neutral or pacific powers with regard to Venezuela remain in the future absolutely intact and guaranteed by respective international arrangements;

Whereas in virtue of Article V of the protocols of May 7, 1903, signed at Washington, the tribunal "shall also decide, subject to the general provisions laid down in Article LVII of the international convention of July 29, 1899, how, when, and by whom the costs of this arbitration shall be paid;"

For these reasons, the Tribunal of Arbitration decides and pronounces unanimously that:

1. Germany, Great Britain, and Italy have a right to preferential treatment for the payment of their claims against Venezuela;

2. Venezuela having consented to put aside 30 per cent of the revenues of the customs of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the three above-named powers have a right to preference in the payment of their claims by means of these 30 per cent of the receipts of the two Venezuelan ports above mentioned.

3. Each party to the litigation shall bear its own costs and an equal share of the costs of the tribunal.

The Government of the United States of America is charged with seeing to the execution of this latter clause within a term of three months.

Done at The Hugue, in the Permanent Court of Arbitration, February 22, 1904.

(Signed) N. MOURAWIEFF.
(Signed) H. LAMMASCH.
(Signed) MARTENS.

## GREAT BRITAIN, FRANCE, AND GERMANY V. JAPAN

### *Protocol*[1]

[Signed at Tokyo, August 28, 1902.]

Whereas, a dispute has arisen between the Government of Japan on the one side and the Governments of Great Britain, France, and Germany on the other, respecting the true intent and meaning of the following provisions of the treaties and other engagements respectively existing between them, that is to say:

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[1] Similar protocols were likewise concluded between and signed by France, Germany, and Japan.

Paragraph 4, Article XVIII, of the treaty of commerce and navigation of April 4, 1896, betwen Japan and Germany: "Sobald diese Einverleibung erfolgt" [that is to say, when the several foreign settlements in Japan shall have been incorporated with the respective Japanese communes], "sollen die bestehenden, zeitlich unbegrenzten Ueberlassungsverträge, unter welchen jetzt in den gedachten Niederlassungen Grundstücke besessen werden, bestätigt und hinsichtlich dieser Grundstücke sollen keine Bedingungen irgend einer anderen Art auferlegt werden, als sie in den bestehenden Ueberlassungsverträgen enthalten sind;" and § 3 of the complementary communication of the same date from the German Secretary for Foreign Affairs to the Japanese Minister at Berlin: "3. dass, da das Eigenthum an den im Artikel XVIII des Vertrages erwahnten Niederlassungsgrundstücken dem Japanischen Staate verbleibt, die Besitzer oder deren Rechtsnachfolger für ihre Grundstücke ausser dem kontraktmässigen Grundzins Abgaben oder Steuern irgend welcher Art nicht zu entrichten haben werden;" and the clause in the reply of the Japanese Minister of the same date, to the foregoing communication: "Dass die darin unter Nummer 1 bis 4 zum Ausdruck gebrachten Voraussetzungen, welche den Erwerb dinglicher Rechte an Grundstücken, die Errichtung von Waarenhaüsern, die Steuerfreiheit der Grundstücke in den Fremdenniederlassungen und die Erhaltung wohlerworbener Rechte nach Ablauf des Vertrages zum Gegenstande haben, in allen Punkten zutreffend sind;"

Paragraph 4, Article XXI, of the revised treaty of August 4, 1896, between Japan and France: "Lorsque les changements cidessus indiqués auront été effectués" [that is to say, when the several foreign settlements in Japan shall have been incorporated with the respective Japanese communes and made a part of the municipal system of Japan; and when the competent Japanese authorities shall have assumed all municipal obligations and duties, and the municipal funds and property belonging to such settlements shall have been transferred to said Japanese authorities], "les baux à perpétuité en vertu desquels les étrangers possèdent actuellement des propriétés dans les quartiers seront confirmés, et les propriétés de cette nature ne donneront lieu à aucuns impôts, taxes, charges, contributions ou conditions quelconques autres que ceux expressement stipulés dans les baux en question;" and

Paragraph 4, Article XVIII, of the revised treaty of July 16, 1894, between Japan and Great Britain: "When such incorporation takes place" [that is to say, when the several foreign settlements in Japan shall have been incorporated with the respective Japanese communes], "existing leases in perpetuity under which property is now held in the said settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property;" and

Whereas, the controversy is not amenable to ordinary diplomatic methods; and

Whereas, the Powers at variance, co-signatories of the convention of The Hague for the peaceful adjustment of international differences, have resolved to terminate the controversy by referring the question at issue to impartial arbitration in accordance with the provisions of said convention;

The said Powers have, with a view to carry out that resolution, authorized the following representatives, that is to say:

The Government of Great Britain: Sir Claude Maxwell MacDonald, G. C. M. G., K. C. B., His Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary;

The Government of France: Monsieur G. Dubail, Minister Plenipotentiary, Chargé d'Affaires of France;

The Government of Germany: Count von Arco Valley, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the German Emperor, King of Prussia;

The Government of Japan: Baron Komura Jutaro, His Imperial Japanese Majesty's Minister of State for Foreign Affairs;

to conclude the following protocol:

I. The Powers in difference agree that the Arbitral Tribunal, to which the question at issue is to be submitted for final decision, shall be composed of three members who are members of the Permanent Court of Arbitration of The Hague, to be selected in the following manner:

Each party, as soon as possible and not later than two months after the date of this protocol, to name one arbitrator, and the two arbitrators so named together to choose an umpire. In case the two arbitrators fail for the period of two months after their appointment to choose an umpire, His Majesty the King of Sweden and Norway shall be requested to name an umpire.

II. The question at issue upon which the parties to this arbitration request the Arbitral Tribunal to pronounce a final decision is as follows:

Whether or not the provisions of the treaties and other engagements above quoted exempt only land held under leases in perpetuity granted by or on behalf of the Japanese Government, or land and buildings of whatever description constructed or which may hereafter be constructed on such land, from any imposts, taxes, charges, contributions, or conditions whatsoever, other than those expressly stipulated in the leases in question.

III. Within eight months after the date of this protocol, each party shall deliver to the several members of the Arbitral Tribunal and to the other party complete written or printed copies of the case, evidence and arguments upon which it relies in the present arbitration. And not later than six months thereafter a similar delivery shall be made of written or printed copies of the counter-cases, additional evidence, and final arguments of the two parties; it being understood that such counter-cases, additional evidence, and final arguments shall be limited to answering the principal cases, evidence, and arguments previously delivered.

IV. Each party shall have the right to submit to the Arbitral Tribunal as evidence in the case all such documents, records, official correspondences, and other official or public statements or acts bearing on the subject of this arbitration as it may consider necessary. But if in its case, counter-case, or arguments submitted to the tribunal either party shall have specified or alluded to any document or paper in its own exclusive possession without annexing a copy such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof within thirty days after such application is made.

V. Either party may, if it thinks fit, but subject to the right of reply on the part of the other party within such time as may be fixed by the Arbitral Tribunal, present to the tribunal for such action as the tribunal may deem proper a statement of objections to the counter-case, additional evidence, and final arguments of the other party if it is of opinion that those documents or any of them are irrelevant, erroneous, or not strictly limited to answering its principal case, evidence, and arguments.

VI. No papers or communications other than those contemplated by Sections III and V of this protocol, either written or oral, shall be admitted or considered in the present arbitration unless the Arbitral Tribunal shall request from either party additional or supplementary explanation or information to be given in writing. If the explanation or information is given, the other party shall have the right to present a written reply within such time as may be fixed by the Arbitral Tribunal.

VII. The tribunal shall meet at a place to be designated later by the parties as soon as practicable, but not earlier than two months nor later than three months after the delviery of the counter-cases as provided in Section III of this protocol, and shall proceed impartially and carefully to examine and decide the question at issue. The decision of the tribunal shall, if possible, be pronounced within one month after the president thereof shall have declared the arbitral hearing closed.

VIII. For the purposes of this arbitration, the Government of Japan shall be regarded as one party and the Governments of Great Britain, France, and Germany, jointly, shall be regarded as the other party.

IX. So far as is not otherwise provided in this protocol, the provisions of the convention of The Hague for the peaceful adjustment of international differences shall apply to this arbitration.

Done at Tokyo, this 28th day of August, 1902, corresponding to the 28th day of the 8th month of the 35th year of Meiji.

(Signed) CLAUDE M. MACDONALD.
JUTARO KOMURA.

### *Decision of the Permanent Court of Arbitration in the matter of perpetual leases, May 22, 1905*

Whereas, according to the protocols signed at Tokyo on August 28, 1902, a disagreement has arisen between the Government of Japan on the one hand and the Governments of Germany, France, and Great Britain on the other regarding the real meaning and scope of the following provisions of the respective treaties and other agreements existing between them, namely:

Paragraph 4 of Article XVIII of the treaty of commerce and navigation of April 4, 1906, between Japan and Germany: "As soon as this embodiment takes place" (that is to say, when the various foreign quarters existing in Japan have been incorporated into the respective communes of Japan), "the existing leases, unlimited as to time, under which real estate is now held in the said settlements, shall be ratified, and no other conditions of any kind shall be imposed with regard to these pieces of real estate than are contained in the existing leases;" and section 3 of the additional communication of the same date from the Secretary of State for Foreign Affairs of the German Empire to the Minister of Japan at Berlin: "3. That, inasmuch as the Japanese Government retains the ownership of the parcels of real estate mentioned in

Article XVIII of the treaty, the holders or their legal successors shall have no taxes of any kind to pay outside of the real estate tax stipulated in the contract;" and the following paragraph of the reply of the Japanese Minister under even date to the foregoing communication: "That the presumptions expressed therein under numbers 1 to 4 with regard to the acquisition of property rights to real estate, the erection of warehouses, the exemption from taxation of real estate in the foreign settlements, and the preservation of duly acquired rights after the expiration of the treaty, are correct in every respect."

Paragraph 4 of Article XXI of the revised treaty of August 4, 1896, between Japan and France: "When the above mentioned changes have taken place" (that is to say, when the various foreign settlements existing in Japan have been embodied into the respective Japanese communes, thereafter forming a part of the municipal system of Japan; and when the competent Japanese authorities have assumed all the municipal obligations and duties, and the municipal lands and property belonging to these settlements have been transferred to said authorities), "the perpetual leases by virtue of which foreigners now possess property in these quarters shall be confirmed, and property of this nature shall not give rise to any imposts, taxes, charges, contributions, or conditions whatsoever other than those expressly stipulated in the leases in question."

Paragraph 4 of Article XVIII of the revised treaty of July 16, 1894, between Japan and Great Britain: "When such incorporation takes place" (that is, when the various foreign quarters existing in Japan shall have been incorporated into the respective communes of Japan), "existing leases in perpetuity under which property is now held in the said settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property."

Whereas the powers at variance have agreed to submit their difference to the decision of a court of arbitration, and in virtue of the above-mentioned protocols the Governments of Germany, France, and Great Britain have designated as arbitrator Mr. Lewis Renault, Minister Plenipotentiary, member of the Institute of France, professor in the faculty at Paris, jurisconsult of the Department of Foreign Affairs, and the Government of Japan has designated as arbitrator His Excellency Mr. Itchiro Motono, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan at Paris, Doctor of Laws.

And whereas the two above-mentioned arbitrators have chosen as umpire Mr. Gregers Gram, former Minister of State of Norway, Provincial Governor.

And whereas the court thus composed has as its mission to decide, in the last resort, on the following question:

Do the provisions of the treaties and other engagements herein above mentioned exempt only the lands held by virtue of the perpetual leases granted by the Japanese Government or in its name, or do they exempt the lands and the buildings of every nature constructed or which may be constructed on these lands, from all imposts, taxes, charges, contributions, or conditions whatsoever other than those especially stipulated in the leases in question?

Whereas the Japanese Government maintains that the lands alone are exempt from the payment of imposts and other charges to the extent which has just been indicated.

And whereas the Governments of Germany, France, and Great Britain claim, on the contrary, that the buildings constructed on these lands enjoy the same exemption.

And whereas, in order to understand the nature and the scope of the engagements contracted on both sides through the perpetual leases it is necessary to examine several arrangements and agreements concluded, under the old treaties, between the Japanese authorities and the representatives of several powers.

And whereas from these acts and stipulations inserted in the leases it is shown:

That the Japanese Government had consented to lend its assistance for the creation of foreign quarters in certain cities and ports of Japan, open to the citizens of other nations.

That on the lands designated for the use of the foreigners in the various localities the Japanese Government has executed, at its own expense, works for the purpose of facilitating their urban occupation.

That as foreigners are not allowed to acquire ownership of lands situated in the country according to the principles of Japanese law, the Government has given them a perpetual lease on the lands.

That the leases determine the extent of the lots leased and stipulate a fixed annual rent, calculated in proportion to the area leased.

That it was agreed that in principle the foreign quarters should remain outside the municipal system of Japan, but that they were not subjected to a uniform organization.

That it was decided, by means of regulations, how the various administrative functions should be provided for, and that it was prescribed that the holders of the lands should be obliged to contribute partially toward the expenses of the municipality by means of dues the amount and mode of collection of which were determined.

And whereas it would be easy to explain the care taken in wording these documents in order to define the obligations of every nature incumbent on foreigners toward the Japanese Government, if it were understood that the annual rent represented not only the price of the lease but also the counterpart of the imposts which the lessees would have been owing by reason of the situation created in their favor by the leases, and that, consequently, they would not, in this capacity, have to bear any imposts and charges but those expressly mentioned in the said leases.

And whereas, moreover, it is not denied that this is the real meaning of this document, as far as lands are concerned, but the Japanese Government alleges that the leases referred only to the bare lands and does not admit that the buildings erected on the lands shall be comprised in the stipulations on which the exemption from taxes would be based.

And whereas it alleged that the lands alone belonged to the Government, the buildings being, on the contrary, the property of the lessees and that in consequence the immunity in question can only extend to the real estate which had never been separated from the Government domain; and whereas, nevertheless, the question to be decided is whether, from the Government's point of view, the buildings erected on the leased lands were, by mutual consent, considered as accessories of these lands or not, and the solution of this question does not depend on distinctions drawn from a pretended difference with regard to the ownership of the real estate.

And whereas the court can therefore not stop to take up the discussion begun on this subject and based on the principles of civil law.

And whereas the lands were leased for the purpose of building houses on them, as is shown at once by the situation of the lands and the nature of the improvements made thereon by the Japanese Government.

And whereas the obligation to erect buildings was imposed in some localities under penalty of forfeiture, and the leases often contained a clause according to which the buildings situated on the lands should become the property of the Japanese Government in case the lessee failed to fulfill his engagements.

And whereas it must be admitted that the circumstances just related offer arguments in refutation of the claim that the soil and the buildings constitute entirely different objects from the Government's standpoint in the relations between the parties.

And whereas in concluding these acts the Japanese Government acted not only as owner of the lands leased but also in its capacity as the sovereign power of the country.

And whereas the will of the parties was consequently the law in the matter, and, in order to determine how the acts were really interpreted we must examine the treatment to which the holders of the lands have actually been subjected in the various localities as far as the taxes are concerned.

And whereas, in this regard, it is known that, according to a practice which has never varied and has been in existence for a long number of years, not only the lands in question but also the buildings erected thereon have been exempt from all taxes, imposts, charges, contributions, or conditions other than those expressly stipulated in the perpetual leases.

And whereas the Government of Japan maintains, to be sure, that this state of affairs, as well as the fiscal immunity which was enjoyed by foreigners in general in that country, was due only to the circumstance that the consular courts refused to give the necessary sanction to the fiscal laws of the country.

Whereas, however, this claim is unsustained by evidence and it is not even alleged that the Japanese Government ever made any reservations with respect to the German, French, and British Governments for the purpose of maintaining the rights which it says were violated.

And whereas, although it has been alleged that the immunity enjoyed by foreigners with respect to taxes under the old treaties was general and extended to foreigners residing outside the concession in question, it is nevertheless shown from information furnished on the subject of the holders of real estate (lands and houses) at Hiogo that the said rule was not universally applied.

And whereas, at all events, the actual situation is not doubtful, however it is explained.

And whereas, from the standpoint of the interpretation of the provisions of the new treaties with regard to which there is a dispute among the parties:

The editing of Article XVIII of the treaty between Great Britain and Japan (which treaty was previous to the two others) had been preceded by propositions to place foreigners holding lands on the same footing as Japanese subjects, both from the standpoint of the ownership of real estate which had been granted them on lease and in regard to the payment of taxes and imposts, but it was afterwards agreed upon to continue the system which had prevailed until then. .

And the Japanese Government claims, to be sure, that the question of maintaining the *status quo* referred only to the lands, but this claim is not substantiated by the expressions employed during the course of negotiations.

And, on the contrary, the representative of the Japanese Government who took the initiative in order to reach an agreement along these lines confined himself to proposing the maintenence of the *status quo* in the foreign settlements.

And it is not to be presumed that the delegate of Great Britain, in presenting a project worked out on the basis of said proposition, intended to make a restriction with regard to the buildings, which is neither shown by the words inserted in the record nor by the purport of the article proposed by him.

And, in order to maintain the *status quo* integrally, it would not be sufficient to admit that the fiscal immunity, which up to that time had extended to both lands and buildings in the foreign settlement, should be maintained with regard to the soil only and that it should cease to exist as far as the houses are concerned.

And this must especially be the case if we consider that, in order to conform to what had been agreed upon, the parties did not confine themselves to drawing up a provision with regard to the confirmation of the leases, but added that no conditions whatsoever other than those contained in such existing leases shall be imposed with respect to such property.

And this latter clause is worded still more explicitly in the treaty with France.

And whereas, moreover, the Powers did not speak of lands in the clauses in question as they must necessarily have done if the immunity, contrary to what had been practiced up to that time, ought to have been confined to the lands.

And whereas, on the contrary, they employed expressions which were broad enough to comprise the entire situation created by the leases for the lessees.

And whereas the court can not, either, admit that the notes exchanged between the German and Japanese Governments at the time of conclusion of the new treaty contained explanations of such a nature as to place Germany in any less favorable situation than the other two Powers.

And whereas the Japanese Government has desired above all to derive an argument from the fact that the German Government based fiscal immunity on the fact that foreigners are prohibited from acquiring ownership to lands situated in Japan, but it is necessary in this regard to consider that the buildings had really always had the character of appurtenances of the lands from the standpoint of taxes, and it can not be presumed that the German Government intended to renounce the advantages allowed in favor of Great Britain by the new treaty, which would moreover be in contradiction with the clause assuring to Germany the treatment of the most-favored nation.

Therefore, the Court of Arbitration, by majority of votes, decides and declares:

The provisions of the treaties and other engagements mentioned in the arbitration procotols not only exempt the lands held by virtue of the perpetual leases granted by the Japanese Government or in its name, but they exempt the lands and the buildings of every nature constructed or which may be constructed on these lands from all imposts, taxes, charges, contributions, or conditions whatsoever other than those expressly stipulated in the leases in question.

Done at The Hague, in the building of the Permanent Court of Arbitration, on May 22, 1905.

(Signed) G. GRAM.
L. RENAULT.

At the time of proceeding to the signature of the present award, availing myself of the privilege conferred by Article LII, paragraph 2, of the convention for the peaceful settlement of international disputes, concluded at The Hague on July 29, 1899, I wish to state my absolute disagreement with the majority of the court with regard to both the grounds and the decision of the award.

(Signed) I. MOTONO.

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## GREAT BRITAIN V. FRANCE

### *Agreement between Great Britain and France referring to arbitration the right of certain Muscat dhows to fly the French flag*

[Signed at London, October 13, 1904.]

Whereas the Government of His Britannic Majesty and that of the French Republic have thought it right, by the declaration of the 10th March, 1862, "to engage reciprocally to respect the independence" of His Highness the Sultan of Muscat;

And whereas difficulties as to the scope of that declaration have arisen in relation to the issue, by the French Republic, to certain subjects of His Highness the Sultan of Muscat of papers authorizing them to fly the French flag, and also as to the nature of the privileges and immunities claimed by the subjects of His Highness who are owners or masters of dhows and in possession of such papers or are members of the crew of such dhows and their families, especially as to the manner in which such privileges and immunities affect the jurisdiction of His Highness the Sultan over his said subjects:

The undersigned, being duly authorized thereto by their respective Governments, hereby agree that these questions shall be determined by reference to arbitration, in accordance with the provisions of Article I of the convention concluded between the two countries on the 14th October last, and that the decision of the Hague Tribunal shall be final.

It is also hereby agreed as follows:

### ARTICLE I

Each of the High Contracting Parties shall nominate one arbitrator, and these two arbitrators shall together choose an umpire; if they can not agree within one month from the date of their appointment, the choice of an umpire shall be intrusted to His Majesty the King of Italy. The arbitrators and the umpire shall not be subjects or citizens of either of the High Contracting Parties, and shall be chosen from among the members of the Hague Tribunal.

### ARTICLE II

Each of the High Contracting Parties shall, within three months from the signature of this agreement, deliver to each member of the tribunal hereby constituted, and to the other party, a written or printed case setting forth and arguing its claims, and a written or printed file containing the documents or any other evidence in writing or print on which it relies.

Within three months after the delivery of the above-mentioned cases, each of the High Contracting Parties shall deliver to each member of the tribunal, and to the other party, a written or printed counter-case, with the documents which support it.

Within one month after the delivery of the counter-cases, each party may deliver to each arbitrator, and to the other party, a written or printed argument in support of its contentions.

The time fixed by this agreement for the delivery of the case, counter-case, and argument may be extended by the mutual consent of the High Contracting Parties.

### ARTICLE III

The tribunal will meet at The Hague within a fortnight of the delivery of the arguments.

Each party shall be represented by one agent.

The tribunal may, if they shall deem further elucidation with regard to any point necessary, require from either agent an oral or written statement, but in such case the other party shall have the right to reply.

### ARTICLE IV

The decision of the tribunal shall be rendered within thirty days of its meeting at The Hague or of the delivery of the statements which may have been supplied at its request, unless, on the request of the tribunal, the Contracting Parties shall agree to extend the period.

### ARTICLE V

On all points not covered by this agreement, the provisions of the conventions of The Hague of the 29th July, 1899, shall apply.

Done in duplicate at London, the 13th day of October, 1904.

[L. S.] PAUL CAMBON.
[L. S.] LANSDOWNE.

## *Decision of the Permanent Court of Arbitration in the matter of Muscat dhows*

The Tribunal of Arbitration constituted in virtue of the *compromis* concluded at London on October 13, 1904, between Great Britain and France;

Whereas the Government of His Britannic Majesty and that of the French Republic have thought it right by the declaration of March 10, 1862, "to engage reciprocally to respect the independence" of His Highness the Sultan of Muscat;

Whereas difficulties as to the scope of that declaration have arisen in relation to the issue, by the French Republic, to certain subjects of His Highness the Sultan of Muscat of papers authorizing them to fly the French flag, and also as to the nature of the privileges and immunities claimed by subjects of His Highness who are owners or masters of dhows and in possession of such papers or are members of the crew of such dhows and their families, especially as to the manner in which such privileges and immunities affect the jurisdiction of His Highness the Sultan over his said subjects;

Whereas the two Governments have agreed by the *compromis* of October 13, 1904, that these questions shall be determined by reference to arbitration, in accordance with the provisions of Article I of the convention concluded between the two Powers on the 14th of October, 1903;

Whereas in virtue of that *compromis* were named as arbitrators, by the Government of His Britannic Majesty:

Mr. Melville W. Fuller, Chief Justice of the United States of America, and

By the Government of the French Republic:

Jonkheer A. F. De Savornin Lohman, Doctor of Law, former Minister of the Interior in the Netherlands, former professor at the free University at Amsterdam, member of the Second Chamber of the States-General;

Whereas the two arbitrators not having agreed within one month from the date of their appointment in the choice of an umpire, and that choice having then been intrusted in virtue of Article I of the *compromis* to the King of Italy, His Majesty has named umpire:

Mr. H. Lammasch, Doctor of Law, professor at the University at Vienna, member of the Upper House of the Austrian Parliament;

Whereas the tribunal has carefully examined these documents, and the supplementary observations which were delivered to it by the two parties;

As to the first question:

Whereas generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants, and whereas therefore the granting of the French flag to subjects of His Highness the Sultan of Mascat in itself constitutes no attack on the independence of the Sultan;

Whereas nevertheless a sovereign may be limited by treaties in the exercise of this right, and whereas the tribunal is authorized in virtue of article 48 of the convention for the pacific settlement of international disputes of July 29, 1899, and of Article V of the *compromis* of October 13, 1904, "to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of international law," and whereas therefore the question arises, under what conditions powers which have acceded to the general act of the Brussels Conference of July 2, 1890, relative to the African slave trade, especially to article 32 of this act, are entitled to authorize native vessels to fly their flags;

Whereas by article 32 of this act the faculty of the Signatory Powers to grant their flag to native vessels has been limited for the purpose of suppressing slave trading and in the general interests of humanity, irrespective of whether the applicant for the flag may belong to a state signatory of this act or not, and whereas at any rate France is in relation to Great Britain bound to grant her flag only under the conditions prescribed by this act;

Whereas in order to attain the above-mentioned purpose, the Signatory Powers of the Brussels act have agreed in its article 32 that the authority to fly the flag of one of the Signatory Powers shall in future only be granted to such native vessels, which shall satisfy all the three following conditions:

1. Their fitters-out or owners must be either subjects of or persons protected by the power whose flag they claim to fly;

2. They must furnish proof that they possess real estate situated in the district of the authority to whom their application is addressed, or supply a solvent security as a guaranty for any fines to which they may eventually become liable;

3. Such fitters-out or owners, as well as the captain of the vessel, must furnish proof that they enjoy a good reputation, and especially they have never been condemned for acts of slave trade;

Whereas in default of a definition of the term "protégé" in the general act of the Brussels Conference this term must be understood in the sense which corresponds best as well to the elevated aims of the conference and its final act, as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice;

Whereas the aim of the said article 32 is to admit to navigation in the seas infested by slave trade only those native vessels which are under the strictest surveillance of the Signatory Powers, a condition which can only be secured if the owners, fitters-out, and crews of such vessels are exclusively subjected to the sovereignty and jurisdiction of the state under whose flag they are sailing;

Whereas, since the restriction which the term "protégé" underwent in virtue of the legislation of the Ottoman Porte of 1863, 1865, and 1869, especially of the Ottoman law of 23 Sefer, 1280 (August, 1863), implicitly accepted by the powers who enjoy the rights of capitulations, and since the treaty concluded between France and Morocco in 1863, to which a great number of other powers have acceded and which received the sanction of the convention of Madrid of July 30, 1880, the term "protégé" embraces in relation to states of capitulations only the following classes: First, persons being subjects of a country which is under the protectorate of the power whose protection they claim; second, individuals corresponding to the classes enumerated in the treaties with Morocco of 1863 and 1880 and in the Ottoman law of 1863; third, persons who under a special treaty have been recognized as "protégés" like those enumerated by article 4 of the French-Muscat convention of 1844; and, fourth, those individuals who can establish that they had been considered and treated as "protégés" by the power in question before the year in which the creation of new "protégés" was regulated and limited — that is to say, before the year 1863 — these individuals not having lost the *status* they had once legitimately acquired.

Whereas, that, although the powers have *expressis verbis* resigned the exercise of the pretended right to create "protégés" in unlimited number only in relation to Turkey and Morocco, nevertheless the exercise of this pretended right has been abandoned also in relation to other oriental states, analogy having always been recognized as a mean to complete the very deficient written regulations of the capitulations as far as circumstances are analogous;

Whereas, on the other hand, the concession *de facto* made by Turkey, that the status of "protégés" be transmitted to the descendants of persons who in 1863 had enjoyed the protection of a Christian power can not be extended by analogy to Muscat, where the circumstances are entirely dissimilar, the "protégés" of the Christian powers in Turkey being of race, nationality, and religion different from their Ottoman rulers, whilst the inhabitants of Sur and other Muscat people who might apply for French flags are in all these respects entirely in the same condition as the other subjects of the Sultan of Muscat;

Whereas the dispositions of article 4 of the French-Muscat treaty of 1844 apply only to persons who are *bona fide* in the service of French subjects, but not to persons who ask for ships' papers for the purpose of doing any commercial business;

Whereas the fact of having granted before the ratification of the Brussels act of January 2, 1892, authorizations to fly the French flag to native vessels not satisfying the conditions prescribed by article 32 of this act was not in contradiction with any international obligation to France:

For these reasons decides and pronounces as follows:

1. Before the 2d of January, 1892, France was entitled to authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly the French flag, only bound by her own legislation and administrative rules;
2. Owners of dhows, who before 1892 have been authorized by France to fly the French flag, retain this authorization as long as France renews it to the grantee;
3. After January 2, 1892, France was not entitled to authorize vessels belonging to subjects of His Highness the Sultan of Muscat to fly the French flag, except on condition that their owners or fitters-out had established or should establish that they had been considered and treated by France as her "protégés" before the year 1863.

As to the second question:

Whereas the legal situation of vessels flying foreign flags and of the owners of such vessels in the territorial waters of an oriental state is determined by the general principles of jurisdiction, by the capitulations or other treaties, and by the practice resulting therefrom;

Whereas the terms of the treaty of friendship and commerce between France and the Iman of Muscat of November 17, 1844, are, particularly in view of the language of article 3, "Nul ne pourra, sous aucun prétexte, pénétrer dans les maisons, magasins et autres propriétés, possédés ou occupés par des Français ou par des personnes au service des Français, ni les visiter sans le consentement de l'occupant, à moins que ce ne soit avec l'intervention du Consul de France," comprehensive enough to embrace vessels as well as other property;

Whereas, although it can not be denied that by admitting the right of France to grant under certain circumstances her flag to native vessels and to have these vessels exempted from visitation by the authorities of the Sultan or in his name, slave trade is facilitated, because slave traders may easily abuse the French flag for the purpose of escaping from search, the possibility of this abuse, which can be entirely suppressed by the accession of all powers to article 42 of the Brussels convention, can not affect the decision of this case, which must only rest on juridical grounds;

Whereas, according to the article 31–41 of the Brussels act, the grant of the flag to a native vessel is strictly limited to this vessel and its owner and therefore not transmissible or transferable to any other person or to any other vessel, even if belonging to the same owner;

Whereas article 4 of the French-Muscat treaty "qui seront au service des Français" the same protection as to the French themselves, but whereas the owners, masters, and crews of dhows authorized to fly the French flag do not belong to that class of persons and still less do the members of their families;

Whereas the withdrawal of these persons from the sovereignty, especially from the jurisdiction of His Highness the Sultan of Muscat, would be in contradiction with the declaration of March 10, 1862, by which France and Great Britain engaged themselves reciprocally to respect the independence of this Prince:

For these reasons decides and pronounces as follows:

1. Dhows of Muscat authorized as aforesaid to fly the French flag are entitled in the territorial waters of Muscat to the inviolability provided by the French-Muscat treaty of November 17, 1844;
2. The authorization to fly the French flag can not be transmitted or transferred to any other person or to any other dhow, even if belonging to the same owner;
3. Subjects of the Sultan of Muscat, who are owners or masters of dhows authorized to fly the French flag or who are members of the crews of such vessels or who belong to their families, do not enjoy in consequence of that fact any right of extraterritoriality, which could exempt them from the sovereignty, especially from the jurisdiction, of His Highness the Sultan of Muscat.

Done at The Hague, in the Permanent Court of Arbitration, August 8, 1905.

(Signed) H. LAMMASCH.
(Signed) MELVILLE W. FULLER.
(Signed) A. F. DE SAVORNIN LOHMAN.

## FINDING OF THE INTERNATIONAL COMMISSION OF INQUIRY ORGANIZED UNDER ARTICLE 9 OF THE CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, OF JULY 29, 1899

### *The International Commission of Inquiry between Great Britain and Russia arising out of the North Sea incident*

### *Agreement of submission*

His Britannic Majesty's Government and the Imperial Russian Government having agreed to intrust to an International Commission of Inquiry, assembled conformably to Articles IX to XIV of the Hague convention of the 29th (17th) July, 1899, for the pacific settlement of international disputes, the task of elucidating by means of an impartial and conscientious investigation the questions of fact connected with the incident which occurred during the night of the 21st–22d (8th–9th) October, 1904, in the North Sea (on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to a British fishing fleet, as well as damages to other boats of that fleet and injuries to the crews of some of those boats), the undersigned, being duly authorized thereto, have agreed upon the following provisions:

### ARTICLE I

The International Commission of Inquiry shall be composed of five members (commissioners), of whom two shall be officers of high rank in the British and Imperial Russian navies, respectively. The Governments of France and of the United States of America shall each be requested to select one of their naval officers of high rank as a member of the commission. The fifth member shall be chosen by agreement between the four members above mentioned.

In the event of no agreement being arrived at between the four commissioners as to the selection of the fifth member of the commission, His Imperial and Royal Majesty the Emperor of Austria, King of Hungary, shall be invited to select him.

Each of the two High Contracting Parties shall likewise appoint a legal assessor to advise the commissioners, and an agent officially empowered to take part in the labors of the commission.

### ARTICLE II

The commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the question as to where the responsibility lies and the degree of blame attaching to the subjects of the two High Contracting Parties or to the subjects of other countries in the event of their responsibility being established by the inquiry.

### ARTICLE III

The commission shall settle the details of the procedure which it will follow for the purpose of accomplishing the task with which it has been intrusted.

### ARTICLE IV

The two High Contracting Parties undertake to supply the International Commission of Inquiry, to the utmost extent which they may find possible, with all the means and facilities necessary, in order to enable it to acquaint itself thoroughly with and appreciate correctly the matters in dispute.

### ARTICLE V

The commission shall assemble at Paris as soon as possible after the signature of this agreement.

### ARTICLE VI

The commission shall present its report to the two High Contracting Parties signed by all the members of the commission.

### ARTICLE VII

The commission shall take all its decisions by a majority of the votes of the five commissioners.

### ARTICLE VIII

The two High Contracting Parties undertake each to bear, on reciprocal terms, the expenses of the inquiry made by it previous to the assembly of the commission. The expenses incurred by the International Commission, after the date of its assembly, in organizing its staff and in conducting the investigations which it will have to make, shall be shared equally by the two Governments.

In witness whereof the undersigned have signed the present declaration and have affixed thereto their seals.

Done in duplicate at St. Petersburgh, November 25 (12), 1904.

(Signed) CHARLES HARDINGE.
(Signed) COMTE LAMSDORFF.

### *Report of the Commissioners, drawn up in accordance with Article VI of the declaration of St. Petersburgh of the 12th (25th) November, 1904*

1. The commissioners, after a minute and prolonged examination of the whole of the facts brought to their knowledge in regard to the incident submitted to them for inquiry by the declaration of St. Petersburgh of the 12th (25th) November, 1904, have proceeded to make, in this report, an analysis of these facts in their logical sequence.

By making known the prevailing opinion of the commission on each important or decisive point of this summary, they consider that they have made sufficiently clear the causes and the consequences of the incident in question, as well as the deductions which are to be drawn from them with regard to the question of responsibility.

2. The second Russian squadron of the Pacific fleet, under the command in chief of Vice-Admiral Aide-de-Camp General Rojdestvensky, anchored on the 7th (20th) October, 1904, off Cape Skagen, with the purpose of coaling before continuing its voyage to the Far East.

It appears, from the depositions made, that, from the time of the departure of the squadron from the roads of Réval, Admiral Rojdestvensky had had extreme precautions taken by the vessels placed under his orders, in order that they might be fully prepared to meet a night attack by torpedo boats, either at sea or at anchor.

These precautions seemed to be justified by the numerous reports received from the agents of the Imperial Government on the subject of hostile attempts to be feared, which in all likelihood would take the form of attacks by torpedo boats.

Moreover, during his stay at Skagen, Admiral Rojdestvensky had been warned of the presence of suspect vessels on the coast of Norway. He had learned, also, from the commander of the transport *Bakan* coming from the north, that he had seen on the previous night four torpedo boats, carrying a single light only, and that at the masthead.

This news made the Admiral decide to start twenty-four hours earlier.

3. Consequently, each of the six distinct divisions of the fleet got under way separately in its turn, and reached the North Sea, independently, in the order indicated by Admiral Rojdestvensky's report; that flag officer commanding in person the last division, formed by the four new battleships *Prince Souvoroff, Emperor Alexander III, Borodino, Orel,* and the transport *Anadyr.*

This division left Skagen on the 7th (20th) October at 10 o'clock in the evening.

A speed of 12 knots was ordered for the first two divisions, and of 10 knots for the following divisions.

4. Between 1.30 and 4.15 on the afternoon of the next day, the 8th (21st) October, all the divisions of the squadron passed in turn the English steamer *Zero,* the captain of which examined the different units attentively enough to enable them to be recognized from his description of them.

The results of his observations are, moreover, in general agreement with the statements in Admiral Rojdestvensky's report.

5. The last vessel which passed the *Zero* was, from his description of her, the *Kamchatka.*

This transport, which originally was in a division with the *Dmitri Donskoi* and the *Aurora,* was, therefore, left behind and isolated about 10 miles to the rear of the squadron. She had been obliged to slacken speed in consequence of damage to her engines.

This accidental delay was, perhaps, incidentally the cause of the events which followed.

6. Toward 8 o'clock in the evening this transport did, in fact, meet the Swedish vessel *Aldebaran* and other unknown vessels and opened fire on them, doubtless in consequence of the anxiety inspired in the circumstances of the moment by her isolation, the damage to her engines, and her small fighting value.

However this may be, the commander of the *Kamchatka,* at 8.45 o'clock, sent a message by wireless telegraphy to his commander-in-chief regarding this encounter, stating that he was "attacked on all sides by torpedo boats."

7. In order to understand the effect which this news had on Admiral Rojdestvensky's subsequent decisions, it must be remembered that, in his estimate, the attacking torpedo boats, of whose presence, 50 miles to the rear of the division which he commanded, he was thus, rightly or wrongly, informed, might overtake and attack him about 1 o'clock in the morning.

This information led Admiral Rojdestvensky to signal to his ships about 10 o'clock in the evening to redouble their vigilance and look out for an attack by torpedo boats.

8. On board the *Souvoroff* the Admiral had thought it indispensable that one of the two superior officers of his staff should be on watch on the captain's bridge during the night in order to observe, in his place, the progress of the squadron, and to warn him at once if any incident occurred.

On board all the ships, moreover, the standing orders of the Admiral laid down that the officer of the watch was authorized to open fire in case of an evident and imminent attack by torpedo boats.

If the attack was from the front he was to open fire on his own initiative, and, in the contrary case, which would be much less pressing, he was to refer to his commanding officer.

With regard to these orders, the majority of the commissioners consider that they were in no way excessive in time of war, and particularly in the circumstances, which Admiral Rojdestvensky had every reason to consider very alarming, seeing that it was impossible for him to verify the accuracy of the warnings that he had received from the agents of his Government.

9. Toward 1 o'clock in the morning of the 9th (22d) October, 1904, the night was rather dark, a slight, low fog partly clouding the air. The moon only showed intermittently between the clouds. A moderate wind blew from the southeast, raising a long swell, which gave the ships a roll of 5° on each side.

The course followed by the squadron toward the southwest would have taken the last two divisions, as the event proved, close past the usual fishing ground of the fleet of Hull trawlers, which was composed of some thirty of these small steamboats, and was spread over an area of several miles.

It appears from the concordant testimony of the British witnesses that all these boats carried their proper lights, and were trawling in accordance with their usual rules, under the direction of their "admiral," and in obedience to the signals given by the conventional rockets.

10. Judging from the communications received by wireless telegraphy, the divisions which preceded that of Admiral Rojdestvensky across these waters had signaled nothing unusual.

It became known afterward, in particular, that Admiral Folkersam, having been led to pass round the fishing fleet on the north, threw his electric searchlight on the nearest trawlers at close quarters, and, having seen them to be harmless vessels, quietly continued his voyage.

11. A short time afterwards the last division of the squadron, led by the *Souvoroff* flying Admiral Rojdestvensky's flag, arrived in its turn close to the spot where the trawlers were fishing.

The direction in which this division was sailing led it nearly toward the main body of the fleet of trawlers, round which and to the south of which it would therefore be obliged to sail, when the attention of the officers of the watch on the bridges of the *Souvoroff* was attracted by a green rocket, which put them on their guard. This rocket, sent up by the "admiral" of the fishing fleet, indicated in reality, according to regulation, that the trawlers were to trawl on the starboard tack.

Almost immediately after this first alarm, and as shown by the evidence, the lookout men, who, from the bridges of the *Souvoroff,* were scanning the horizon with their night glasses, discovered "on the crest of the waves on the starboard bow, at an approximate distance of 18 to 20 cables," a vessel which aroused their suspicions because they saw no light, and because she appeared to be bearing down upon them.

When the suspicious-looking vessel was shown up by the searchlight, the lookout men thought they recognized a torpedo boat proceeding at great speed.

It was on account of these appearances that Admiral Rojdestvensky ordered fire to be opened on this unknown vessel.

The majority of the commissioners express the opinion, on this subject, that the responsibility for this action and the results of the fire to which the fishing fleet was exposed are to be attributed to Admiral Rojdestvensky.

12. Almost immediately after fire was opened to starboard, the *Souvoroff* caught sight of a little boat on her bow barring the way, and was obliged to turn sharply to the left to avoid running it down. This boat, however, on being lit up by the searchlight, was seen to be a trawler.

To prevent the fire of the ships being directed against this harmless vessel, the searchlight was immediately thrown up at an angle of 45°.

The Admiral then made the signal to the squadron "not to fire on the trawlers."

But at the same time that the searchlight had lit up this fishing vessel, according to the evidence of witnesses, the lookout men on board the *Souvoroff* perceived to port another vessel, which appeared suspicious from the fact of its presenting the same features as were presented by the object of their fire to starboard.

Fire was immediately opened on this second object, and was, therefore, being kept up on both sides of the ship, the line of ships having resumed their original course by a correcting movement without changing speed.

13. According to the standing orders of the fleet, the Admiral indicated the objects against which the fire should be directed by throwing his searchlight upon them; but as each vessel swept the horizon in every

direction with her own searchlights to avoid being taken by surprise, it was difficult to prevent confusion.

The fire, which lasted from ten to twelve minutes, caused great loss to the trawlers. Two men were killed and six others wounded; the *Crane* sank; the *Snipe,* the *Mino,* the *Moulmein,* the *Gull,* and the *Majestic* were more or less damaged.

On the other hand, the cruiser *Aurora* was hit by several shots.

The majority of the commissioners observe that they have not sufficiently precise details to determine what was the object fired on by the vessels; but the commissioners recognize unanimously that the vessels of the fishing fleet did not commit any hostile act, and the majority of the commissioners being of opinion that there were no torpedo boats either among the trawlers nor anywhere near, the opening of fire by Admiral Rojdestvensky was not justifiable.

The Russian commissioner, not considering himself justified in sharing this opinion, expresses the conviction that it was precisely the suspicious-looking vessels approaching the squadron with hostile intent which provoked the fire.

14. With reference to the real objectives of this nocturnal firing, the fact that the *Aurora* was hit by several 47-millimeter and 75-millimeter shells would lead to the supposition that this cruiser, and perhaps even some other Russian vessels, left behind on the route followed by the *Souvoroff* unknown to that vessel, might have provoked and been the object of the first few shots.

This mistake might have been caused by the fact that this vessel, seen from astern, was apparently showing no light, and by a nocturnal optical illusion which deceived the lookout on the flagship.

On this head the commissioners find that they are without important information which would enable them to determine the reasons why the fire on the port side was continued.

According to their conjecture, certain distant trawlers might have been mistaken for the original objectives, and thus fired upon directly. Others, on the contrary, might have been struck by a fire directed against more distant objectives.

These considerations, moreover, are not in contradiction with the impressions formed by certain of the trawlers, who, finding that they were struck by projectiles and remained under the rays of the searchlights, might believe that they were the object of a direct fire.

15. The time during which the firing lasted on the starboard side,

even taking the point of view of the Russian version, seems to the majority of the commissioners to have been longer than was necessary.

But that majority consider that, as has already been said, they have not before them sufficient data as to why the fire on the port side was continued.

In any case, the commissioners take pleasure in recognizing, unanimously, that Admiral Rojdestvensky personally did everything he could, from beginning to end of the incident, to prevent trawlers, recognized as such, from being fired upon by the squadron.

16. Finally, the *Dmitri Donskoi* having signaled her number, the Admiral decided to give the general signal for "cease firing." The line of his ships then continued on their way, and disappeared to the southwest without having stopped.

On this point the commissioners recognize, unanimously, that after the circumstances which preceded the incident and those which produced it, there was, at the cessation of fire, sufficient uncertainty with regard to the danger to which the division of vessels was exposed to induce the Admiral to proceed on his way.

Nevertheless, the majority of the commissioners regret that Admiral Rojdestvensky, in passing the Straits of Dover, did not take care to inform the authorities of the neighboring maritime powers that, as he had been led to open fire near a group of trawlers, these boats, of unknown nationality, stood in need of assistance.

17. In concluding this report, the commissioners declare that their findings, which are therein formulated, are not, in their opinion, of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky, or of the personnel of his squadron.

# BOOK REVIEWS

*Studies in History and Jurisprudence.* By James Bryce, D. C. L. London: Henry Frowde. New York: Oxford University Press. 1901.

Mr. Bryce's collection of "Studies" is too well known to be made the subject of extended comment at this late date. But the relations of history — especially of political history — to legal development, which he has made peculiarly his own and in which his ripe learning and rare capacity for sound generalization are at their best, have such an intimate bearing on the origin and present condition of international law that we may be pardoned a belated reference to those portions of the work which deal with that subject. These are meager enough and might well be expanded into a volume, but, meager as they are, will repay thoughtful consideration.

Mr. Bryce confines his comments on the law of nations to two aspects of international relations — one the modifications which the doctrine of sovereignty undergoes when applied to the relations of dependent or partially dependent states to the superior state; the other the influence which the doctrine of a natural law, underlying and shaping the development of actual legal relations, has exerted on the history of international law.

The section dealing with sovereignty in international relations is, indeed, little more than a suggestion of the difficulties which the subject presents. As our author says, "The varieties of relation in which one state may legally stand to another are * * * endless and elude any broad classification," and the nature and degree of the sovereignty exercised by the one over the other — complete or partial, perfect or imperfect — must vary accordingly. The fundamental difficulty, that of basing any notion of sovereignty on a superior authority derived wholly from treaty, where the laws of the paramount state do not run to the inferior state, is barely more than glanced at. But surely here is the very root of the matter. If the treaty whereby a state agrees to transact its diplomatic business exclusively through the foreign office of another state is in the legal sense a surrender of its sovereignty, what shall be said of a treaty of alliance whereby two states bind themselves, on paper, to subject their military and naval establishments to one another's use under certain circumstances? Can it be said *strictissimi juris* that such engagements result in anything more than rights (and rights of imperfect obligation at that) *in personam?* And should not the term "sovereignty" be in all cases confined to the *status* which a state has assumed, a status recognized by, and, in the sense of international law at least, enforceable against all other nations? These questions show how intricate the problem of sovereignty really is in international relations and how much more elucidation it requires than it receives in the work before us.

The indebtedness of our international law to the doctrine of a natural law, common to all mankind, which was adopted from the Roman jurists by Grotius, Gentilis, Paffendorf, and their successors, is a commonplace of the schools. Our author does not attempt to say anything new on the subject, but restates the conventional view clearly and, consistently with the scope of his paper, with adequate fullness. It is much to be desired, however, that Mr. Bryce or some other competent student of political history shall give us a work in which the influence of this noble humanitarian conception, which our modern analytical methods have done so much to discredit, shall be rigorously compared with the influence of maritime custom and of modern humanitarian feeling in the actual international law as practiced by the nations in their intercourse with one another. One can not help feeling that, as in the development of municipal law and of political institutions, the influence of general conceptions has been somewhat exaggerated and that we owe much to the course of events which we are fain to attribute to theories of law and government. The importance of a more scientific and rigorous treatment of the law of nations is emphasized by the importance which that law is likely to assume in the world-wide movement for international arbitration and the establishment of a high court of arbitral justice. These prefigure a development of international law in the next few decades of which its previous history and present state are but faint adumbrations.

GEORGE W. KIRCHWEY.

*The Law Affecting Foreigners in Egypt.* By James Harry Scott. Revised edition. Edinburgh: William Green and Sons. 1908. pp. xii, 390.

The appearance of this book is rendered timely by Lord Cromer's proposals for the reform of the system of justice and legislation in force in reference to foreigners resident in Egypt. This complicated system, which prevents useful legislation and frequently works a denial of justice, is a product of the "capitulations." The work is not, as its title might indicate, a technical treatise on the system of justice administered by the mixed courts of Egypt. Nor does it deal in any detail with consular jurisdiction. The author's purpose is to give an account of the origin and development of the capitulations, to show their effect upon the legal status of the foreigner resident in Egypt, and to consider in what way the system may be modified. Abolition of the capitulations seems to be out of the question, since without the guaranty of the valuable privileges they contain it would be impossible for Europeans to live in security in Egypt.

About one-half of the book is devoted to the origin and history of the capitulations, chapters being given to such topics as the following: "The Trade Between East and West;" "Privileges Granted to Foreign Merchants by the Christian States of the East;" "The Rise of Islam;" "The Trade of Egypt from the Twelfth to the Sixteenth Century;" "The Rights and Privileges Granted by the Early Egyptian Capitulations;" "The Ottoman Capitulations;" "The Tanzimat;" "Egypt and Turkey."

To the author "it is clear that capitulations were granted by the Ottoman Sultans before the fall of Constantinople, and that even after the capture of that city several states received capitulations before that granted to France." He therefore disagrees with the majority of French authors who cite the French capitulation of 1535 as the first Ottoman capitulation. The importance of this French capitulation is recognized, however, since it was the first essentially political one to be granted.

The Tanzimat, or reform in Turkey, is dealt with in a brief but clear chapter. The unsuitability of Mohammedan law to the requirements of modern civilization is brought out, and the author concludes that the chief fault in the Tanzimat was that the proposed reforms were introduced with too much haste. "Reforms, when they affect the social life of a people, should be introduced gradually, and should never be of such extensive character that it is entirely beyond the powers of the people to assimilate them." The Sultans, as well as the European powers, are blamed for the failure to achieve the desired result.

The chapter on "The Ottoman Laws of Protection and Nationality" treats of one of the most interesting problems which arose out of the intervention by European states in the internal affairs of Turkey, during the period of the Tanzimat; namely, how to check the denationalization of her subjects. At first through the so-called right of "protection" and later by conferring the title of subject on large numbers of Ottoman subjects who had never quitted Ottoman territories, the foreign states withdrew many Turkish subjects from the jurisdiction of the local authorities and placed them under the protection of the capitulations. The law of protection of 1863 and the Ottoman law of nationality of 1869 checked these abuses, but it is pointed out that since the passage of these laws Egypt has advanced in civilization where the Ottoman Empire has remained stationary, and that "the law which was sufficient for Turkey in 1869 is not sufficient for Egypt to-day."

Chapter XI deals with the land laws of Turkey and Egypt and Chapter XII treats of the firmans and British occupation. "As a result of the firmans, Egypt undoubtedly is still a province of the Ottoman Empire, but by these firmans and by custom she has acquired a degree of autonomy which approaches independence," as seen in her power to legislate as to internal matters and her power to make conventions. The author holds that the Egyptian Government has power to make conventions in reference to every question except the cession of territory or the making of peace or war. "In consequence, the Ottoman Government has no longer power to bind Egypt by treaties contracted between the Porte and foreign powers, although all existing treaties made between the Porte and foreign powers are binding on Egypt, except in so far as they have been expressly modified or abrogated. Thus, the Ottoman capitulations are binding on Egypt, and, in fact, this was expressly stipulated for in the convention of London of 1840."

British occupation is justified thus: "Reform in the administration was essential to the welfare of Egypt, but the Khedive not only required advice as to the nature of the reforms necessary, but also power to enforce these reforms. When a person is incapable of acting by himself the law appoints a guardian to give him advice and assist him in his acts; England, by the force of circumstances, had the office of guardian to Egypt forced upon her, and until the ward is capable of acting alone this relationship must continue."

The privileges accorded to foreigners by the capitulations embrace the right to reside and trade in Ottoman territory; religious freedom; inviolability of domicile; exemption from taxation, except customs dues; the right to apply the national law of succession; and immunity from local jurisdiction and local laws. The first named are discussed only briefly. The right to enter Egyptian territory and trade there no longer rests on the capitulations, but has been accorded by customs conventions. Egyptian practice has gone further in its toleration of religious freedom than the capitulations themselves. Certain taxes have been consented to in international agreements by the powers, so that there is no tax of any importance which is not due just as much from foreigners as from Egyptian subjects. Moslem law itself recognizes the right to apply the national law of a deceased foreigner in regulating his succession.

Although the privilege of inviolability of domicile has been abused, it and immunity from taxation should be preserved until the rights they guarantee are fully safeguarded by some other means.

Certain obsolete provisions of the capitulations are pointed out, such as the clauses forbidding piracy, the arresting of English ships, etc.

The privileges of jurisdiction and legislation are the most important grants contained in the capitulations, and they are treated at length, both with reference to the periods before and after the institution of the mixed courts in Egypt.

Reference is made to article 4 of the capitulation of the United States of America of 1830 concerning consular jurisdiction in the case of a crime committed by an American citizen on an Ottoman subject, but no mention is made of the interesting controversy between our State Department and Turkey over the proper interpretation of that clause.

The modifications in the judicial system as a result of the creation of the Egyptian mixed tribunals in 1876 are shown, and the existing system of courts — mixed, native, and religious — is fully explained. Consular courts are discussed only incidentally, since their regulation and organization depend upon the law of the state which the consul himself represents. However, the Ottoman order in council of 8th August, 1899, which regulates the British consular courts in Egypt, is given in full in the appendix.

The question of competence of the mixed courts depends on that of nationality. Some of the decisions which have resulted in the extension of jurisdiction beyond the original intention are briefly summarized. Of especial interest is the development of the theory of mixed interest, whereby the consular and native courts are ousted of jurisdiction, which is assumed by the mixed tribunals in all cases where some third party, who is a foreigner, may be indirectly interested. Thus, the mixed courts take jurisdiction as soon as a "mixed interest" arises in any case brought before the courts, even if the parties to the case are of the same nationality, native or foreign — *e. g.*, in cases of bankruptcy where there is a foreign creditor.

The difficulties growing out of the decisions holding that consular and diplomatic agents could not renounce their complete immunity from the jurisdiction of the mixed courts are explained and the legislation corrective thereof is noted. There is also a discussion of the penal jurisdiction of these courts, and an explanation of the courts of personal statute and religious communities, which deal with such questions as marriage, juristic capacity, inheritance, wills, etc., subjects which are outside the competence of the mixed courts.

The inadequacy of the codes and the difficulties of legislation as to foreigners, owing to the necessity of the express consent of foreign governments to new Egyptian laws applying to their subjects, are explained. There is also a good, brief description of the Egyptian legislative institutions.

The concluding chapter deals with the "Future Reform of the Capitulations" and is based largely on Lord Cromer's reports of recent years, including that for 1906. The author appreciates the difficulties of creating an international legislative council and agrees with Lord Cromer in deprecating the idea of distinct representation by nationality. He suggests that the system of organization adopted by the French colonies in the Levant offers a system of electoral divisions which might be established in Egypt.

The book contains material not included in any other single volume. It is the best treatment of the subject in English, and is a useful addition to the literature of Egyptian problems. There is an index and a bibliography which is serviceable, but not complete. Such works as those of Stamatios, Benoit, Dislere et DeMoüy, Moiron, and De Freycinet are omitted. The reference in the note on page 315 should be to page 321 instead of page 323. "Cogordon" should read "Cogordan" on page 386. The date of Van Dyck's valuable Consular Report should be 1882 instead of 1862, as given on page 387.

ROBERT BRUCE SCOTT.

*La Guerre Russo-Japonaise au Point de vue Continental et Le Droit International, d'après les Documents officiels du Grand-Major Japonais.* By Nagao Ariga. Paris: A. Pedone. 1908. pp. 587.

*International Law Applied to the Russo-Japanese War, with the Decisions of the Japanese Prize Courts.* By Sakuyé Takahashi. New York: The Banks Law Publishing Co. 1908. pp. 805.

*La Guerre Russo-Japonaise au Point Vue de Droit International. I. Origine et Causes de la Guerre.* By Francis Rey. Paris: A. Pedone. 1907. pp. 200.

The Russo-Japanese war has given rise to a number of treatises and monographs which can not fail to heighten the interest in and increase our knowledge of international law and diplomacy.

First in interest and importance was "The Russo-Japanese Conflict" (1904), by K. Asakawa, which dealt very thoroughly with the causes of the great struggle. There followed an excellent essay by that veteran publicist, T. J. Lawrence, entitled, "War and Neutrality in the Far East," of which the second edition appeared in the summer of 1904. This little work, attractive and illuminating as it is, was necessarily very incomplete, owing to the early date of its publication. Then appeared, during the year following (1905), a work entitled "International Law as Interpreted during the Russo-Japanese War," by Messrs. F. E. Smith and N. W. Sibley, barristers-at-law. This "bulky and pretentious" volume contained much useful, if ill-digested, information and copious discussion of irrelevant as well as relevant points and precedents.

To the reviewer, who had published a series of articles on this subject in the Green Bag for 1904, the field seemed still open, and his "International Law and Diplomacy of the Russo-Japanese War" appeared early in 1907. This work was based on all the documents available at the time of publication, and discussed a considerable variety of topics. Special mention should also be made of Professor Holland's splendid letters to the London Times, which we hope soon to see in book form. But of course the Japanese and Russian archives remained unexplored, and without access to these documents an absolutely impartial and exhaustive treatment of the subject remains impossible.

Professors Ariga and Takahashi have performed a great service for students of international law and diplomacy by not merely engaging in this work of exploration and discovery and furnishing us with the results of their investigations and experiences, but by publishing the texts of the most interesting and important Japanese documents. For this work both of these distinguished publicists are exceptionally well equipped.

Professor Ariga served as legal adviser to Japanese armies during the Chino-Japanese and Russo-Japanese wars. His excellent work on "La Guerre Sino-Japonaise au point de vue du droit international" (1896), containing the results of his experiences and studies during that conflict, is well known and appreciated. During the Russo-Japanese war, he was chief legal adviser on Marshall Oyama's staff and assisted General Nogi in the negotiations at Port Arthur. He was therefore in a good position to observe the course of events at Port Arthur and in Manchuria. For this reason, although he assures us that he has consulted all the documents relating to the conflict, he has confined himself in this book to the operations of war on land. This work, which includes numerous diplomatic as well as military documents and contains numerous illustrations, is addressed to officials and historians as well as to jurists and students of international law and diplomacy. It includes an interesting preface by M. Paul Fanchille, the distinguished editor of the Revue Générale de Droit International Public, a table of contents, and a number of curious illustrations, but, alas! no index.

Professor Takahashi is also well known and well equipped for such a task. During the Chino-Japanese war he was legal adviser to the Japanese fleet and embodied the results of his observations and researches in a useful work, entitled, "Cases of International Law during the Chino-Japanese War." During the Russo-Japanese conflict he was a member of the legal committee in the Department for Foreign Affairs. He observes somewhat naïvely: "One year's experience in such a position, together with three years of study of the subject, has enabled me to become fully acquainted with every detail of the international contest, and it is not from a desire for personal glory, but from a sense of duty, that I have compiled the present treatise." He continues:

> In the former treatise I refrained from discussing matters pertaining to the war on land, because I was not in a position to do the work thoroughly. In the present volume I have included all matters, both naval and military, which occurred during the late war, for my official position enabled me to study both branches. Now I am permitted to publish what I believe will be a material aid to the study of diplomacy and international law.

Ariga accepts the opinion of the Japanese prize court, in the case of the *Ekaterinoslav*, that the exact date of the beginning of hostilities was 7 a. m., February 6, 1904, when the Japanese fleet set out from Sasebo with orders to attack the Russian fleet. Takahashi is of the opinion that the war began with the capture of the *Ekaterinoslav*, which took place at 9 a. m. on February 6. Both authors fail to point out that, taking into account the difference in time between Tokyo and St. Petersburg, this was from twelve to fourteen hours before the delivery of a certain famous dispatch by M. Kurino to Count Lamsdorff at 4 p. m. on February 6. The severing of international relations at Tokyo occurred at 2 p. m. the same day.

It is obvious that the Japanese view implies that the war was begun before the actual breach of diplomatic relations — a conclusion which is evaded by our authorities, although Takahashi (pp. 16-19) cites, without condemnation, a number of historical instances of sudden attack or invasion during peace, *e. g.*, the invasion of Silesia by Frederick the Great.

The opinion which the reviewer supported in his "International Law and Diplomacy of the Russo-Japanese War (Chapter I) was based on the theory that actual war did not begin before February 8. This is also the opinion of M. Rey, who has carefully examined the subject from every side (See Revue Générale de Droit International for Mars-Avril, 1907, pp. 313 *et seq.*).

On pages 42 and 59 Takahashi pays what is evidently a heartfelt tribute to the United States for her protection of Russo-Japanese non-combatants in districts occupied by the Russians. In his chapter on "Trading with the Enemy," etc. (Part I, Chapter I), he calls attention to the fact that during the Chino-Japanese war the Japanese Government "winked" at the exportation of coal to China without officially defining its position in the matter. No declaration on this subject was made even during the Russo-Japanese war, but in a number of cases (cited on pages 85 and 86) Japan interdicted the exportation of coal on British vessels consigned from Japanese ports to Hongkong, Saigon, and Singapore. The author is of the opinion that in the future Japan should conform to the practice of its ally, England, in this matter of trading with the enemy, it being well known that Great Britain is one of the states which strenuously forbids it.

Of especial interest are Ariga's chapter (II) on "The Theatre of War" and Takahashi's chapter (Part II, Chapter X) on "The Occupation of Manchuria." Ariga rejects both the official Russian and Japanese views in respect to the legality of Japan's conduct in Korea, and rightly maintains that Japan was forced to violate the neutrality of Korea by the necessities of the situation, more particularly because of the threatened invasion of the country by the Russians.

Unfortunately, Ariga does not give us any facts bearing on the widespread charges against the subsequent conduct of the Japanese in Korea. This may be because his official duties did not familiarize him with the conditions there. It may be noted in passing that the student of Korean affairs will find very little to satisfy his curiosity in either of the works before us.

Both authorities agree that the rights exercised by Russians and Japanese in Manchuria were based on the law of military occupation. Both fail to point out the analogy between the status of Manchuria during the war and that of territory with "double or ambiguous sovereignty."

Both of our Japanese publicists furnish numerous details regarding the Japanese and Russian treatment of prisoners of war, of the sick, killed, and wounded, etc., and Ariga gives us an interesting chapter (Chapter VIII) on "The Work of the Japanese Red Cross Society," which numbers over 1,300,000 members. In round numbers[1] 74,000 Russian prisoners were interned in Japan during the war; of these 71,802 were delivered to Russia at the close of the war. Japanese prisoners interned in Russia did not much exceed 2,000.

In order to show what misunderstandings may arise from the failure of the nations to agree upon some conventional signal to serve as a sign of surrender on the part of individual soldiers, Ariga (page 102) relates the following amusing incident:

> One very dark evening a Japanese soldier, posted as sentinel, was greatly frightened by the sudden appearance of a Russian soldier, who, coming out of the shadow, threw himself upon him and kissed him on the cheek. The Japanese soldier, who, like most of his compatriots, had never visited Europe and did not know the meaning of the kiss, lost his head and wanted to attack the Russian with his bayonet. The latter then fled, but returned some minutes afterwards and effusively shook the hand of the Japanese soldier, who now understood that the Russian desired to surrender.

Friend and foe have united in praising Japan's treatment of Russian prisoners of war, and the evidence seems to bear out Takahashi's boast (page 95) that "it is with heartfelt pride that Japan can produce several proofs to show that she gave this great number of Russian prisoners the very best treatment in her power, a treatment far better than that given by Russia to the Japanese prisoners in her country." But on the whole

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[1] Round numbers are given because there are slight discrepancies in the figures furnished by our two authorities. There were 74,003 Russian prisoners interned in Japan, according to Ariga; 72,408, according to Takahashi.

Russia also seems to deserve praise in this respect; for the complaints of the Japanese in Russia related to such matters as delay in receiving letters and parcels, lack of reading matter, infrequent baths, and too strict limitations on the amount of beer and whisky which they were allowed to purchase.

In their care of the sick and wounded, as well as in their treatment of prisoners, the Japanese undoubtedly deserve the highest praise and admiration. As the reviewer remarked in his "International Law and Diplomacy of the Russo-Japanese War" (page 319):

> In these respects this "pagan" nation of warriors appears indeed to have set up new standards of international law and morality for the future guidance and imitation, let us hope, of the so-called "Christian" nations of the West.

This was mainly due to the superior organization of their medical and Red Cross service and to the application of scientific knowledge and preservation of sanitary conditions. Our own Government would do well to study the Japanese system and introduce its good features into our army and navy. The results of this service are best shown by some statistics. Out of 79,817 Russian sick treated medically in Japanese hospitals 77,494 were restored to health. The deaths numbered only 373 (Takahashi, page 134). Out of 21,730 Russian sick and wounded cared for within the theater of military operations, but 1,158 (of whom 500 had scurvy, contracted at Port Arthur) died (Ariga, pages 131–132). The Empress of Japan deserves especial praise and gratitude for having furnished artificial eyes and limbs to those of the Russian prisoners who had need of them.

The conduct of both belligerents appears to have been comparatively free from intentional acts of cruelty and barbarity or from ruses involving treachery. There were, however, charges and countercharges in which the Russians appear to get decidedly the worst of it. While admitting that the conduct of the Japanese was probably much better than that of the Russians, it is difficult to believe that the former committed practically no crimes, blunders, or excesses. And yet this is the impression which these works somehow manage to convey. The Russian charges are summarily disposed of (especially by Takahashi) as false, and everything emanating from Japanese official sources seems to be accepted as unquestionably true. This may be in accordance with the facts, but it does not square with our preconceived ideas respecting even Japanese human nature. To our perhaps distorted Western vision, the Japanese in these books appear too good to be real. It would have been more politic to concede a few minor delinquencies on the part of the Japanese.

In a few cases, however, our authors are able to convict the enemy from Russian documents, as in the following extract from an order issued by Colonel Muller of the Russian army on February 9 (22), 1905:

> Instruct all men and noncommissioned officers that in advancing, if they find en route any Japanese soldiers lying flat, especially those lying on the back, they shall pierce them through; for the Japanese are wont to assume the appearance of being wounded and, when the attack begins, to fire upon us from behind. [See Ariga, page 150, and Takahashi, page 170.]

Here they have succeeded in convicting a Russian officer of what is undoubtedly a cruel and inhuman order, but at the cost of throwing suspicion upon the virtue of their own compatriots.

According to Ariga (page 211), the "greatest violation of the laws of war in the twentieth century" was a cavalry attack on the Mongolian frontier under orders of General Mischtchenko upon two Japanese field hospitals.

Ariga devotes two interesting chapters (X and XI) to the siege, bombardment, and capitulation of Port Arthur. This account derives additional interest and value from the fact that the learned author was a member of General Nogi's staff and himself bore an important part in the negotiations for the surrender of this fortress and the disposition of the sick and wounded. In view of subsequent charges against General Stoessel, his opinion that the capitulation of Port Arthur was not premature (page 316) is worth emphasis.

Under the heading "The Laws of Naval Warfare" (Part III) Takahashi discusses in successive chapters the "Sinking of Merchantmen," "Incidents Bearing on Prize Law," "The Blockade of the Liaotung Peninsula," "Floating Hospitals," "War Correspondents," and "Coast Bombardment."

> At the very outset, the reader's attention should be directed to the glaring fact that Russian warships were guilty of sinking merchantmen, and among their victims not only Japanese but neutral ships are to be reckoned. The author is firmly convinced of the unjustifiability of the conduct of the Russians, who freely fired at ships or torpedoed them, even in cases where these cruel measures were by no means required. [Takahashi, page 275.]

He then furnishes a list of the merchantmen, both foreign and Japanese, searched, captured, and sunk by Russian warships in the seas of Japan, together with full data relating to each of those which were sunk. Of these latter there appear to have been twenty-one

Japanese vessels (including twelve sailing ships) and seven foreign or neutral steamships, viz, the *Knight Commander,* the *Thea,* the *Hipsang,* the *St. Kilda,* the *Ikona,* the *Old Hamia*[2] and the *Tetartos.*

There can be no doubt that, under the most lenient interpretation of the law and the facts, the destruction of many of these vessels was unwarranted and outrageous. It is evident that the Russian prize regulations are in sad need of revision. The same criticism may be applied, in a lesser degree, to our own naval code of 1900 and the Japanese prize regulations of 1904. They all alike fail to distinguish between the circumstances under which enemy and neutral vessels may be destroyed.

The most interesting points in connection with the blockade of the Liaotung Peninsula are the refusal by the Japanese Government to permit (1) the supplying of medicine to the besieged at Port Arthur and (2) the establishment of a hospital liner for the transportation of sick and wounded to Chefoo and Shanghai.

The chapter on "War Correspondents" contains a lengthy citation from the "International War Situations" published by the United States Naval College at Newport, the text of the Japanese regulation for war correspondents, and the reports of several cases to "show why the Japanese authorities were obliged to pay such great attention to the keeping of military secrets" (page 397).

The chapter on "Bombardment of Sea Coasts" is disappointing. It contains no real discussion of the subject.

Part IV of Takahashi's book is entitled "Neutrality." It deals with "The Treatment of Belligerents and Russian Warships in Neutral Ports," "The Sale of Vessels by Neutrals to Belligerents," and "Contraband of War." In his chapter (XIX) on "Neutrality on Land," Ariga confines himself to the various charges and countercharges of a violation of Chinese neutrality which passed between China, Russia, and Japan.

On pages 417 and following Takahashi furnishes a list of Russian warships detained, disarmed, or destroyed in neutral ports, together with the data in each particular case. He thus states his general conclusion at the outset:

> The enforcement of internment and disarmament of a belligerent warship in neutral ports after the expiration of a certain term granted may be regarded as a new item added as a direct result of the late war to stipulations of international law.

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[2] The *Old Hamia* was burned.

Exception must be taken to his justification of the destruction of the Russian torpedo boat destroyer *Ryeshitelni* by two Japanese destroyers at Chefoo on the night of August 11, 1904; as also to his characterization of the perfectly legitimate protest of China against this outrage as "an expression of unique Chinese diplomacy, which blames her benefactor without remembering what she owes" (page 440). We have yet to learn that national gratitude involves submission to violence.

The special pleading of Takahashi and other Japanese apologists has not changed the reviewer's opinion that the conduct of the Japanese Government in this case, "although altogether exceptional, constitutes a blot upon a record which was otherwise remarkably clean and spotless from the standpoint of international law." (See International Law and Diplomacy of the Russo-Japanese War, p. 263.)

Takahashi's chapter on "The Sale of Vessels by Neutrals to Belligerents during the Russo-Japanese War" is highly unsatisfactory, both in what it says and in what it omits. Our confidence in the author's impartiality has already been destroyed by his aggressive pleading for Japan. Our confidence in his knowledge of international law is considerably weakened by such a statement as that which appears on page 487: "International law imposes an obligation upon a neutral government to prevent its subjects from selling any war materials to either party of the belligerents." Or is *war materials* a misprint for *war vessels?* Even thus stated, the proposition is one which many publicists would controvert.

The chapter on "Contraband" contains some interesting and valuable documents, most of which have, however, been published elsewhere. To the jurist and to students interested in international law as a science, the most valuable portion of Takahashi's book is that part containing the actual decisions of Japanese prize courts, many of which are reported verbatim in Part V. They are classified under such headings as "Enemy Vessels," "Vessels Carrying Contraband Persons" (a term which the author admits is not "quite scientific"), "Vessels Carrying Contraband Goods," "Blockade Runners," "Unneutral Services," and "Released Vessels."

There are also six appendices, containing a diary of the war between Japan and Russia, Japanese regulations governing captures at sea, a complete list of the vessels captured by the Japanese navy, etc., and, scattered throughout the work, twenty tables illustrative of all sorts of topics. Through the courtesy of Mr. Ellery Stowell, who has seen the papers in this case, the reviewer is able to point out an error on page 800 in the table containing a list of vessels captured by the Japanese. The British sailing vessel *Antiope,* which was condemned by the higher prize court of Japan, really carried *salt* instead of *coal.*

Of these two books by leading Japanese authorities and experts, Ariga's is the more restrained, mature, and scholarly; but, owing to its wider scope and the greater amount of documentary material, Takahashi's is perhaps the more useful. Both works are marred by evidences of special pleading, although Ariga is the less aggressive of the two advocates.

There are a number of important topics which receive no attention in these volumes, such as wireless telegraphy, submarine mines, the voyage of the Baltic fleet, the North Sea incident, and the cases of the *Allanton,* the *Malacca,* and the *Prinz Heinrich.* However, after all deductions have been made, let us repeat that students of international law owe a large debt of gratitude to both of these distinguished and enterprising Japanese scholars for their publications.

But, in spite of all that has been published, the final work on "The Russo-Japanese War from the Standpoint of International Law and Diplomacy" still remains to be written. From present indications, it appears that this task is being accomplished, and worthily accomplished, by M. Francis Rey, Chargé de Conférences à la Faculté de Droit de Paris. The first installment of his work on "The Origin and Causes of the War" lies before us. Several additional chapters have since appeared in the Revue Générale de Droit International Public, from which the above is an extract.

Although the reviewer is unable always to agree with M. Rey in his interpretation of the facts or in his conclusions, he can not conceal his admiration of the scientific method of treatment and the mastery of his subject displayed by the writer. The work promises to be a model of scholarship. M. Rey is accurate in his statement of facts, clear in the exposition and application of principles to the facts, logical in reasoning and arrangement of subject-matter, and apparently exhaustive in his knowledge of the subject. Indeed, the work is so well done that there is little left for the critic except to admire and praise the result. We await with the greatest interest the completion of what, from the scholar's point of view, promises to be a masterpiece.

AMOS S. HERSHEY.

*La Guerre de Sept Ans. Histoire Diplomatique et Militaire.* Tome IV.
By Richard Waddington. Paris [1908]. pp. viii, 637.

This volume bears no date on the title-page, but the preface is dated October 28, 1907. The second and third volumes of the same work appeared in 1904, and the first in 1899. A year or two earlier than the last-mentioned date the same author published "Louis XV et le Renversement des Alliances," which is virtually an introduction to this monumental treatise on the Seven Years' War. Since the earlier volumes have not been reviewed in this magazine it may not be superfluous to suggest that a review of the first may be found in the American Historical Review, V. 339, and of the second and third in the same periodical, X. 397. Most of the criticisms of the author's style and merit, both favorable and unfavorable, in the reviews of the earlier volumes apply equally well to this. His reputation is too well known to need extended comment. He stands very near the forefront of present day historical scholarship in France. In the volume under review he shows a vivid and entertaining narrative style. He is especially happy in his transitional sentences. He carries his account of a particular campaign or negotiation forward to a convenient stopping place and then goes back and brings up a contemporaneous one without any effort on the reader's part, thus handling complex related movements in detail with perfect clearness.

The elaborate thoroughness with which the subject is treated is suggested by the fact that this entire volume is devoted to the years 1760 and 1761. Of the eleven chapters into which the volume is divided the first six, covering nearly 400 pages, deal with military events, and the last five, covering a little less than 250 pages, with diplomatic incidents. In the first chapter, entitled "Landshut and Liegnitz," the author gives a clear, detailed, and interesting account of the midsummer campaign centering around the decisive conflicts at these two places. He shows that the petulance of Frederick the Great manifested in his too severe criticism of Fouqué's inactivity was largely responsible for the latter's giving battle at Landshut against such fearful odds that defeat was inevitable. Frederick's remorse for his needless sacrifice of his old friend and general and the consequent weakening of the Prussian position in Silesia caused him suddenly to leave Dresden, where he had been operating against the Austrian Marshal Daun, and hasten toward Silesia. Daun, adopting the views of the Court at Vienna, left Dresden to pursue the Prussian King and ordered Laudon, the victor of Landshut, to concentrate the Austrian forces at Liegnitz. After several days' advance Frederick as suddenly abandoned his plans and turned on Dresden. Daun, after some hesitation, followed him back. After several days' siege a vigorous sortie of the Austrians defeated the Prussians. Inexplicable Austrian hesitation allowed Frederick to recover himself and again hasten off towards Silesia. Again the Austrians pursued, the hostile armies moving as if under the same command. It was a race for Liegnitz. The two arriving at almost the same time, Frederick was compelled to give battle to the united Austrian armies fully twice as numerous as his own. But in spite of the fearful odds he won and was thereby enabled to effect a junction with the army of his brother, Prince Henry, before Breslau, and so prevent the union of the Austrians with their somewhat tardy Russian allies approaching Breslau from the east. In the 75 pages which the author devotes to this chapter he gives enough of those interesting details without which the recital of military events is tedious and unprofitable.

In a similar manner the second chapter treats of the combined Russian and Austrian capture and occupation of Berlin, and of the related movements; the third chapter deals with the campaign of Torgau, the last great pitched battle of the war; the fourth studies De Broglie's campaign in Hesse-Cassel; and the fifth, the struggle about Clostercamp, on the lower Rhine. The sixth is an interesting and sufficiently detailed account of the death-throes of French domination in Canada, ending with the capitulation of Montreal. The author brings out in strong contrast the heroic resistance of the unaided Canadians and the culpable negligence and imbecility of Louis XV and his ministers.

The military portions of the earlier volumes have been severely criticised on the ground that they are too elaborate to appeal to the general reader and not technical enough to satisfy the student of military science and tactics. A careful reading of the chapters just mentioned can hardly fail to lead one to agree with the criticism. It is perhaps unfortunate for the author that since about the time his great work was projected the public has been more than usually interested in international peace conferences, disarmament proposals, arbitration agreements, and other projects for doing away with war. During the same time teachers of history have been pretty generally condemning the disproportionate attention formerly given to military history. There may be a reversion; but until that occurs the author must expect comparatively few readers for his military chapters. It will always be convenient, however, for the student who is particularly interested in this period to have available such an exhaustive treatise of the campaigns of this war.

No such criticism can be made on the diplomatic part of the author's work. The study of diplomacy is coming more and more into favor. Chapter seven, which begins this portion, is devoted to the radical changes in British policy, due to the accession of George III, with his extravagant notions of the royal prerogative, his hatred for Pitt, and his unaccountable subservience to his Scotch favorite, Bute. The ministers were so divided among themselves that the only way they could be brought together was through the good offices of Viry, the clever and officious Sardinian minister at London. The beginning of the changed relations between the courts of London and Madrid are discussed in this chapter. The accession of Charles III brought new vigor to the Spanish court. He presented a long list of grievances. Pitt's reply was tardy and unsatisfactory. Then came an imperious demand for satisfaction. Pitt retorted in a similar tone and relations became strained. At the same time, as Pitt suspected, Choiseul's advances at Madrid were being welcomed. The 45 pages of this chapter show that the author is as much at home in handling the maneuvers of diplomats as of generals.

In a similar manner chapter eight deals with Choiseul's long and only partially satisfactory attempts to induce Austria and Russia to agree to a basis for a general pacification which would be satisfactory to France. Chapter nine studies the extended but futile negotiations between Pitt and Choiseul for a separate peace in 1761. Chapter ten is a study of the rupture of the negotiations for separate settlements between the various combatants, and of the successful issue of the negotiations between France and Spain. Chapter eleven, the last of the volume, studies this family compact and the influence it had on the rupture between England and Spain.

Less space might profitably have been devoted to discussion of such of these negotiations as came to naught, *e. g.*, those of chapter nine and part of ten. Such can not be said, however, of those discussed in chapters seven and eleven, which had such far-reaching positive results.

The author has drawn his material for both the military and diplomatic chapters almost wholly from documentary sources found in the archives of the various countries interested. He quotes freely from these sources and always cites his authorities. There are very few pages without citations and some pages contain many. The footnotes contain scarcely any matter other than citations of authorities. The numerous and lengthy quotations are incorporated in the body of the page and in regular type. Herein M. Waddington has subjected himself to the most serious criticism that can be passed upon his work. There is seldom a page without a quotation, and many pages contain several each, and not a few are almost entirely quoted. In such cases the author's work is scarcely more than stringing together fragments of thoughts from others. It must be admitted that he has done it in a very skilful manner. But still it is often disconcerting. Had he made the body of the page wholly or almost wholly his own work, summarizing briefly only the essential thought of the documents, he would have saved much time for the reader and much space for the publisher. In the space thus saved he could have quoted from the same documents at much greater length by throwing the quotations into smaller type in the footnotes. This would have been better both for the general reader, who would not then have been compelled to wade through the documents, and for the special student, who would probably wish more of some documents.

WILLIAM R. MANNING.

*Neutral Rights and Obligations in the Anglo-Boer War.* By Robert Granville Campbell. Published in the Johns Hopkins University Studies. The Johns Hopkins Press: Baltimore. 1908. pp. 149.

Adhering strictly to his title the author has arranged a mass of material in a most logical and readable manner. He never loses sight of the relative importance of the incidents to which he refers, and while he avoids frequent and tiresome quotations he indicates the sources from which he has gathered his information, so that the scholar or the statesman may use them to get at more detailed information about any particular subject relating to the war.

The first chapter speaks of the neutrality of the United States. Mr. Campbell goes into some detail about the representation of British interests by Mr. Crum, the American consul at Pretoria, and, after his resignation, the sending of Secretary Hay's son to take his place.

Speaking of the possibility of European intervention he says (page 11):

> Moreover, it was authoritatively stated that any concerted European intervention would not meet with favor in Washington, as such action would only tend to disturb general commercial relations by embroiling most of the nations of the world. Any attempted intervention would certainly have led to a conflict of the powers, and would have involved questions of national supremacy, disturbed the balance of power, and raised the Chinese question, in which last the United

> States had an important interest. It was a sound policy, therefore, upon the part of the United States not to encourage any intervention by European nations in the affairs of Great Britain in South Africa.

That our Government did not live up to the spirit of its neutral obligations seems to be the opinion at which the author arrives. He refers to the extensive shipments of mules and horses from the port of New Orleans where British army officers were established to look after the purchase and dispatch of the animals. One can not help sympathizing with the efforts of Mr. Samuel Pearsons to get our Government to enforce upon our citizens a strict observance of our neutral obligations; for, as is said on page 22:

> That warlike supplies were actually transported from at least one of the ports of the United States under such a systematic scheme as to constitute a base of hostile supplies for the English forces in South Africa, would seem to be established.

And on page 28:

> The attitude of the Administration with reference to Pearson's letter, it was believed by the press, was not of a character to inspire great confidence in the strict performance of neutral duties. To ignore an allegation of so flagrant a character as the breach of neutrality, it was declared, constituted a disregard of American ideals in the interests of British imperialism, which could not be excused by the jocular references to "General" Pearson's request to the President "to either put an end to this state of affairs or permit me to strike one blow."

Whatever the opinion of these transactions, all must condemn the high-handed procedure of the British officers who refused to pay the Americans caring for the horses on the trip to Africa, unless they enlisted in the British army (page 30):

> The testimony of a number of other witnesses sworn before the commissioner for the eastern district of Louisiana showed that the wages of the men employed upon the ship *Montcalm* had been refused by the captain unless they would agree to enlist in the British army, but as American citizens they had refused to enlist and had demanded the wages due them under the ship's articles. August Nozeret, an American citizen, foreman of a corps of muleteers on board the *Montcalm*, testified that he was told by the ship's officers that the only way to secure his discharge at Port Elizabeth was to have a recruiting officer vouch for his enlisting in the British army; and that he complied with this demand and escaped enlistment only by pretending to be physically unable to count the number of perforations in a card when required to do so as a test of sight at the recruiting office. The affiant was able to say from his own personal knowledge that certified discharges were not given unless the men were willing to enlist in the English army.

The most interesting part of the second chapter on the neutrality of European powers is that which treats of the action of the Portuguese Government and recounts how Mr. Potts, Dutch consul at Lourenço Marquez, took over the interests of the South African Republics, and used his office, until his exequatur was withdrawn, to facilitate the shipment of men and supplies to Pretoria; equally interesting is the account of the manner in which the English were allowed to send troops through Portuguese territory to Rhodesia, thus cutting off the northern retreat of the Boer forces. Mr. Campbell (page 67) arrives at the conclusion that although the European powers are usually hostile to England when she is at war, the general condemnation of her proposed use of neutral territory seems to have been well founded in this particular case. Mr. Baty's views on this same incident are critically examined (page 74). The chapter closes with the following sentence (page 77):

> The action of the Portuguese Government in allowing this [passage of troops] to be accomplished was a gross breach of the duties incumbent upon a neutral state in time of war.

In the first months of the war Portugal seems to have favored the Boers, but she found it impossible to resist the pressure which the British Government brought to bear.

Chapter III is entitled "Contraband of War and Neutral Ports." It is interesting to make the comparison with Baty's treatment of the same subject (see the JOURNAL, vol. 2, p. 711). Both are scientific, but Campbell does not so much seek to get at the tendencies and ultimate results of the action taken by the different governments as to analyze the exact present significance of the action, and when he does generalize he has, of course, the advantage of Baty's reflections. On page 85 is found a concise summary of the seizures of the three German ships *Bundesrath, Herzog,* and *General,* followed by the judicial aspects of the seizures. On page 109 the author points out the inconsistency of the British attitude, as regards the doctrine of continuous voyage applied to contraband, in the cases of the German seizures and that of the *Gaelic,* seized by the Japanese during the Chino-Japanese war. After reading these pages we understand better the difficulties of searching for contraband aboard the great vessels of to-day, and we see how it was that England came to propose the abolition of contraband at the last Hague Conference.

The last chapter deals with "Trading with the Enemy." American shippers who sent flour, etc., in British ships to neutral ports in South Africa were caused much loss and annoyance because the British

Government seized the ships on the ground that the supplies were destined to the enemy and that their transportation constituted the municipal offense of trading with the enemy. The British Government unloaded the cargo in British ports, but disclaimed any intention of interfering with its delivery by a neutral vessel. Practically, however, the result was almost as disastrous to the neutral as though it had been condemned as contraband. The United States protested that the flour was not destined to the enemy or his territory, to which the British Government replied that its action referred solely to a municipal matter, and that it was for Great Britain to determine whether or not its subjects had contravened her municipal regulations. The United States persisted and in the end the American owners obtained the price which the goods "would have brought at the port of destination at the time they would have arrived there had the voyage not been interrupted."

> The view held by the English statesman [Lord Salisbury] was that Great Britain's concession in these cases should not serve as a precedent in the future [page 144].

The discussion of the seizure of the *Maria, Mashona, Beatrice,* and *Sabine* shows that in point of fact Great Britain did not sustain her pretended right to decide exclusively what regulations and what penalties for their contravention should be applied to her ships and shipowner irrespective of the incidental damage caused to the interests of citizens of a third state, except that these latter might have recourse for damages against the shipowner whose illegal action, under the municipal law of Great Britain, had been the cause of the damage. Dimly outlined we see the principle taking shape that when one of two states or their citizens have for years been deriving advantage from their relations and one deals with its own in such a way as to affect adversely the interests of the other or its citizens it will be responsible for the damage caused if its action was so sudden, so severe, or so arbitrary as to render its anticipation unlikely. This principle has had — and for a long time is likely to acquire — nothing more than a diplomatic recognition accorded when the state which suffers the loss is equally powerful or more powerful than the state whose action caused it.

The passages quoted seem to show a bias in favor of the cause of the Boers. But this is not the case. In fact, it would be difficult to find a more impartial and scientific treatment of a subject which has divided the sympathies of mankind.

Ellery C. Stowell.

*La Doctrina Drago, con una advertencia preliminar de S. Pérez Triana, y una introduction de W. T. Stead.* Wertheimer, Lea y Cia.: London. pp. lxxx, 257.

The "caballero argentino" who has collected these documents has arranged them in a most convenient form for reference. In view of its great importance to Latin America her statesmen will be gateful to him for helping them to find at a moment's notice what has been done and said concerning this famous doctrine which has carried the name of one of the sons of South America around the world.

Although the Hague convention concerning the forcible recovery of contract debts is not the embodiment of the doctrine of Dr. Drago, no one doubts for a moment that this convention, which is the joy and the hope of humanity because it is the first case of an international agreement for obligatory arbitration, was due to the broad-minded statesman of Argentina. As delegate he may have, when signing, registered the reservation of his Government, but he must have felt that besides being a great step forward the convention would be a great protection to the states of Latin America. It may not protect them in all cases where they are honestly unable to meet the payments on arbitral awards to which they have been condemned, but it will do much to prevent the presentation of exorbitant demands for payment of debts so as to have an excuse for the use of force.

The preface by Señor Triana gives a little history of the events which led to the declaration of the doctrine. He says on page xlix:

> It should be remarked that the Drago Doctrine, in spite of the fact that it was not specifically studied and discussed at the Second Peace Conference, was the only principle, new and rich in possibilities, which was brought to the notice of the delegates of the nations in that universal assembly.

Further on Señor Triana seems ready to admit that although the forcible recovery of debts from a sovereign state should in principle not be allowed, when the government of a country has been seized by a set of unpatriotic adventurers it would be iniquitous to treat such a band of robbers with the respect due the sovereignty of a people (page li).

> There can in such circumstances be no question of the sovereignty of a people but only of the supremacy of a man or group who seek to exploit it tyrannically and despotically to their own ends by resorting to ignominious means of oppression. * * *
>
> In such a condition of affairs the Drago Doctrine, protector of sovereignty, would protect those who had gained control from all attack from abroad, the fear of

> which might sometimes prevent the perpetration of crimes against unarmed people deprived of their rights and humiliated by the robbers of their sovereignty * * * [page lii].
>
> For these reasons, foreign governments might well consider that they have a right to pass judgment upon any condition of affairs — in appearance only relating to internal matters — which vitiates, debases, or destroys the essence and development of sovereignty by converting it into a possible instrument of fraud and conspiracy in foreign territory, and these judgments might take shape and form the basis of their rules of action.
>
> This does not affect the justice of the Drago Doctrine — protector of the sovereignty of weaker nations. That doctrine does not nor can not refer to spurious sovereignties: Here as in the case of the laws governing the minting of coin the application is to money of good alloy and not to that which conterfeiters coin and put in circulation [page lv].

When the statesmen of great powers deal with weaker countries they do take the character of the government into consideration, in an unofficial manner; but formally to enunciate this as a principle for general observance would be to legitimatize intervention. It is, however, well that Señor Triana has brought the question up for discussion.

Mr. Stead's introduction will be read with interest. He discusses the importance of the Drago Doctrine and its difference from the so-called "Porter Proposition." He quotes, on page lxvi, Dr. Drago's words:

> Pecuniary obligations shall not be converted into chains for South America.

That is the essence of the doctrine and reveals clearly its ethical and political aspects.

ELLERY C. STOWELL.

*International Problems and Hague Conferences.* By T. J. Lawrence, M. A., LL. D. J. M. Dent & Co.: London. 1908.

The aim of this book is, as Dr. Lawrence tells us, twofold: "It attempts to furnish students with an account of the Hague Conferences, considered not as isolated phenomena but as immensely important points in the evolution of international society, and it endeavors to place before thoughtful people who take an interest in the affairs of the world around them sound information about a series of events of which they have read in a desultory fashion in their newspapers, but as to which their knowledge is, as a rule, both imperfect and confused." But in addition the author seems to have the clear purpose of warning his countrymen in particular and the world in general that a great maritime war fought in the midst of the present uncertainty and confusion governing blockade, contraband, and the search and confiscation of private property would destroy the results of years of industry and frugality and disastrously affect the vital interests of neutral commerce. And because some solution, some compromise between the opposing tendencies of Anglo-American and continental practice, must be found before a code can be elaborated Dr. Lawrence offers for the consideration of the reader suggestions to form the basis of such a compromise. It is no small matter for one of the masters of the science of international law to come out boldly and propose radical reforms in the customs and procedure which his country has been wont to follow. In the first place, he encounters the great inert mass of merely acquisitive scholarship. Its devotees would punish his temerity by severe criticism and the other means by which a scholar is made to feel the disapproval of his brothers. But we must find a solution for the present conflicts of interests and practice and it will be much cheaper to obtain by thinking than as the result of a terrible war. It is the duty of writers on international law to offer us suggestions.

Dr. Lawrence insists repeatedly that England can not consent to any codification of international law nor to bind herself by the decisions of the International Prize Court unless she be formally assured that food shall, under no circumstances, be classed as absolute contraband. He says (page 158):

> We can not be satisfied with less than a formal acknowledgment of the correctness of our view. It would be involved necessarily in a general assent to the abolition of contraband altogether. It might come as a part of a revised law of contraband, or it might stand alone as the solitary article in an international agreement.

Regarding blockade, and the right of search, he writes (page 192):

> The chief difficulties might be removed by fixing a zone of so many hundred miles from the blockaded port and allowing within it, but not outside, all the operations of a blockade, including the capture of approaching vessels whose masters have a real knowledge of its existence.
>
> The next set of questions to be considered are those connected with the law of search and detention. * * * In the instructions given to the British plenipotentiaries at the last Hague Conference it was stated that our Government would be glad to see the right of search limited, and "the adoption of a system of consular certificates" was mentioned as a practicable plan. Various ways have been proposed of carrying into effect the root idea contained in this suggestion. That which seems least liable to objection involves the employment by

> each belligerent of its consuls in neutral commercial ports as agents who should, on request of neutral shippers, supervise the loading of cargo on board neutral vessels. Every facility for examination must be given to them; and at the end of the proceedings they would sign in duplicate a certificate to the effect that the description of the passengers, if any, and the cargo in the ship's official papers coincided exactly with the persons and things on board.

In different places Dr. Lawrence criticises the inadequate, not to say inhumane, action of the Hague Conference respecting the use of mines, and treats at length the questions of their prohibition, of the purpose for which they shall be employed, and of the localities in which they may be sown or anchored. If the corpses of the hundreds of Chinese who have lost their lives from Russian and Japanese mines since the end of the war could have been laid along the entrance to the Hall of the Knights at The Hague, perhaps the supposed interests of certain backward, feeble, or army-ridden states would have given place to the interests of humanity. The wailing of the starving families of the dead Chinese would not have been sweet music in the ears of those who advocated the most liberal and unrestricted use of mines.

The seventh chapter deals with the attempt to set up an international prize court and explains the mechanism and action of the proposed court, and the advantages and dangers with which its adoption might be attended, together with the means to eliminate them. Referring to the English attitude as regards the court he says (page 149):

> There are among us a number of intensely patriotic persons, whose love of their own country is combined with a deep distrust of others and a profound belief that all foreigners are eagerly awaiting the first opportunity of falling upon us and despoiling us of trade, wealth, and empire. They feel; they do not argue. But they express their feelings loudly and mistake the expression for argument. They are convinced that the proposed International Prize Court is nothing better than a wicked device of the malevolent foreigner to obtain by guile what he has hitherto failed to effect by force, the downfall and ruin of England. The court will be packed with tools of alien governments, who will outnumber the just and noble-minded Briton by fourteen to one, and not only secure decisions against us on every occasion, but manipulate rules to our permanent disadvantage. Thus, our navy will be deprived of the power to strike effective blows; and the British Samson, lulled to sleep in the arms of the International Delilah, will fall a prey to the alien Philistines who are waiting to bind and enslave him. The picture is lurid, but it can not be taken seriously. It substitutes a den of thieves for a society of nations. It assumes that Great Britain alone is virtuous, while all other powers are villainous. If it were correct it would necessitate the dissolution of international society and the destruction of international law. Unconsciously the believers in it are going

> back to undiluted barbarism. For what is barbarism but the rule of force; and what do they constantly assert but that Great Britain, being the strongest of states at sea, should dictate from the quarter-deck the rules of maritime warfare that suit her at the moment, and enforce them from the mouths of her cannon? Thus, the innocent victim of the International Prize Court is turned into the tyrant of the high seas, and we are bidden to applaud the transformation. As a matter of fact, the first portrait is as fanciful as the second is loathsome. We are neither the Simple Simon nor the bully of the nations. The picked jurists of the civilized world will be zealous for the honor of their craft, and are no more likely to degrade the law they administer into an instrument for the humiliation of any state than is an English judge to turn an English statue into a means of gratifying his private vengeance. They will come from countries which, like our own, are sometimes belligerents but generally neutrals.

This last sentence in the quotation explains the reason for England's change of attitude. She has come to the realization that her destiny is peace. She must remain strong to strike her foes, but her commercial interests must not be at the mercy of any countries that wish to fly at one another. The reader will find all through the book interesting reflections and criticisms.

It is a long time since a book on international law of the highest interest to the student and at the same time attractive to the general reader has appeared. No greater work can be done than to arouse popular interest in the organs of international intercourse and to give the citizen of average intelligence the means to form his opinion regarding the policies to be followed. Very few, it is true, will ever arrive at a correct understanding of the questions involved, but the view which the majority of the nation holds will at times control the action of its diplomatists. It is therefore imperative to make as clear as possible to the great mass of the country the fundamental principles of its international policy. The more ignorant they are upon these matters the more disastrous will be the results, when in moments of passion and upheaval they reject the counsels of those competent to advise and take the reins of power into their own hands or follow in the lead of some demagogue.

The difference which it may make to England accordingly as she accepts or rejects the proposed Prize Court is calculated to make her statesmen pause. Perhaps she has never had to decide a question of such vital importance to her.

Nothing could better sum up this little book than the words of Professor Louis Renault, referring to another by the same author:

Je ne connais pas d'ouvrages de droit des gens dont je crois avoir tiré autant de profit que de vos Principes de Droit International, d'une exposition si élégante et si claire, tenant compte a la fois de l'équité et des nécessités pratiques.

ELLERY C. STOWELL.

*International Documents.* Edited by E. A. Whittuck. Longmans, Green & Co.: London. 1908. pp. xxxviii, 252.

Mr. Whittuck states in his preface that "this handbook is intended to make the treatise it sets out in French and English more easily accessible, they being those which for the study of international law have most frequently to be consulted and compared. Parts I and II of the texts thus brought together have been for some time in type, waiting for the results of the Hague Conference of 1907. Part III, containing the acts of this conference, has been added as soon as possible, but as these conventions have not yet been ratified this part must be regarded for the present as supplementary."

Part I contains the Declaration of Paris, the Geneva Convention of 1864 and the additional articles of 1868, and the Declaration of St. Petersburg of 1868. Part II gives the text of the various conventions and declarations of the First Peace Conference of 1899, as well as the Geneva Convention of 1906, and the Declaration of Brussels as an appendix to the law of land warfare of the First Conference. Part III prints the various conventions, declarations, and vœux of the Second Peace Conference.

The student has thus before him the entire text of the two peace conferences, as well as certain previous and related conventions necessary to the understanding of the various Hague conventions. The work is preceded by an introduction of some thirty-one pages, explaining briefly the inter-relation of the various documents and their value. As stated by Mr. Whittuck in his preface, the French original of each text is given with an accompanying and accurate translation. Cross references are supplied and modifications and additions in the Second Conference are printed in italics. The student is therefore able to see to what extent the Second Conference revised the work of the first and in how far its work was original.

The title of the work is unfortunate in that it does not indicate the contents of the book, although it does suggest its character. The arrangement of the book requires some little study, but upon examination is sufficiently clear. Each group is treated as a separate entity and is complete within itself, but as there is no general table of contents the reader must make his own table of contents and learn the exact position of the text by actual examination. It should be said, however, that to each part is prefixed a special table of contents, so that reference to the book is easy, provided the reader knows whether the particular document is to be found in Part I, II, or III, or has mastered the system of division.

A more serious drawback is the absence of an index, a lack which is likely to embarrass a reader not over-familiar with the texts and their contents. The volume contains a list of signatures (pages 229–232), and the various reservations to the conventions (pages 233–235), and closes with the instructions to the British plenipotentiaries to the Second Conference (pages 235–247), and a series of notes by Sir Edward Fry, and one by Sir Edward Grey, on the results of the conference (pages 248–252).

Mr. Whittuck's introduction is careful, painstaking, and accurate, and is likely to prove of great service to the student. There is noticeable, however, a slight slip on page xxv, in regard to the convention respecting the limitation of the employment of force for the recovery of contract debts. Mr. Whittuck states that "the subject of this convention was brought before the conference by the South American republics — states, it will be remembered, not invited to the First Hague Conference." The latter part of this statement is unfortunately true, but the subject of the convention was not presented to the conference by the South American republics, but was introduced by General Horace Porter on behalf of the American delegation, pursuant to direct instructions from the Secretary of State. This is, however, a slight blemish in an exceedingly meritorious work.

Mr. Whittuck states that "should this publication be found to be of use, it will be continued in subsequent volumes of a similar kind." It is to be hoped that the success of the work will be such that it will be merely the first of an important series.

James Brown Scott.

*Die Zweite Haager Konferenz.* By Alfred H. Fried. Leipzig: B. Elischer Nachfolger. 1908.

*La Seconde Conférence de la Paix.* By Ernest Lémonon. Paris: Librairie Générale de Droit et de Jurisprudence. 1908.

During the recent Hague Conference the reporters complained that they did not receive adequate information and the public generally seems to have been in the dark as to the exact nature and progress of the work actually accomplished by the conference. Since its adjournment on October 18, 1907, many minds and many pens have been busy with the self-imposed task of seeking to enlighten the public by articles in magazines, by brochures, and finally by careful and comprehensive studies on the conference. It will therefore be the fault of the public if it does not form a correct estimate of the nature and value of the conference, and its failure to do so will be no criticism of the authors and works, but an indication of indifference on the part of the public.

There are two general ways in which the results of the conference can be set forth. In the first place, the author may give a general survey of the work as a whole, considering details only in so far as necessary to an understanding of the positive results achieved. In the second place, the author may give an account of the proceedings as they actually occurred, show the forms in which the projects were introduced, and trace their modifications until they assume a form acceptable to the conference. Mr. Alfred H. Fried, in his excellent but brief German work on the conference, has chosen the first method, whereas M. Lémonon has, although a Frenchman, chosen the detailed and photographic method generally to be found in German authors. To understand and appreciate each work at its value it is necessary to understand the method consciously chosen and followed by the author.

Mr. Fried's chief interest is in the results of the conference which make for peace, whereas M. Lémonon considers with equal care, accuracy, and detail the entire work of the conference, commission by commission, project by project, whether it deal with peace and the means of safeguarding it or with war and its possible humanization. Mr. Fried does not believe that war can be humanized, as murder is murder whether it be performed in a gentlemanly or ungentlemanly manner, and quotes a statement of Koch, that "Die Folter ist durchaus nicht zu verwerfen, wenn nur menschlich gefoltert wird." He dismisses the attempts to humanize war with the statement of the missionary who said that although he had not been able to cure the heathen of cannibalism he had so far succeeded as to have them use knives and forks in the process.

Mr. Fried's chief interest, therefore, is with the work of the first commission, to which he devotes the larger part of his work, and in a singularly clear and concise style points out the great progress made in the revision of the convention for the peaceful settlement of international disputes, by the acceptance of the principle of obligatory arbitration, by the acceptance of the convention for the limitation of force in the collection of contract debts, in the negotiation, and it is to be hoped establishment, of the International Court of Prize, and has a kind word to say for the Court of Arbitral Justice, which, although not completed, he regards as certain to be established in the near future. Mr. Fried, as is to be expected, devotes very great attention to the attitude of the German delegation in the matter of obligatory arbitration, and regards it as a great misfortune that Marschall von Bieberstein opposed the convention concerning compulsory arbitration. He is undoubtedly right in regarding the defeat of the convention as a small matter compared with the recognition of the principle of obligatory arbitration, and he is further right in his contention that the real value of the convention consisted solely in the fact of its recognition of the principle of obligatory arbitration. As, however, the principle was accepted squarely by Germany and by the conference without a dissenting voice, the failure of the convention, while unfortunate, can not be regarded as a defeat for obligatory arbitration. He might have said that the principle was incorporated in a concrete and visible form in the convention for the limitation of the use of force in the collection of contract debts, so that obligatory arbitration triumphed in fact as well as in theory.

The concluding section of the little book, dealing with the importance of the positive results, is especially interesting and valuable. He finds that the recent conference differed from the First Conference in the fact that it was in fact as well as in theory a world conference, and he attributes its so-called failures to the "fiction of equality; the fiction of unanimity; and the dogma of unrestricted sovereignty." Much of Mr. Fried's criticism is sound, but we must not overlook the value of the equality of states, even although we may regret that a too rigid insistence upon it prevented the adoption of the Court of Arbitral Justice. Undoubtedly, the so-called "fiction" served a good turn in the past and the recognition of the interdependence of states will in time lead to the exercise of sovereignty in the interest of the community at large.

Mr. Fried is an exceedingly clear and incisive writer, who expresses his thought without hesitation and without reserve. His comment on the attitude of certain delegations is likely to cause considerable controversy, but the interest is rather enhanced by the expression of his personal views. It is a clear, accurate book and deserves success.

M. Lémonon's book is vouched for in a preface by M. Léon Bourgeois, the enlightened first French delegate who played such a conspicuous and highly honorable rôle both for himself and his country, and it is dedicated to Baron d'Estournelles de Constant. The work may almost be called official and it bids fair to remain the standard treatise in the French language upon the Second Hague Conference. It is very comprehensive. Its introduction of sixty-three pages gives an excellent résumé of the First Conference and the origin of the second, of the opening of the Second Conference and of the second plenary session at which the work was apportioned to the four commissions into which the conference as a whole was divided.

M. Lémonon thereupon takes up the work of the conference, commission by commission, and in a conclusion of seventeen pages (771–787) analyzes the work of the conference as a whole and declares manfully and authoritatively that the conference, in restricting force and extending the domain of justice, of law, and of civilization, deserves commendation.

It is difficult to give an adequate idea of this admirable production, based as it is upon the most careful, painstaking, and intelligent study of the minutes of the conference. The learned author considers each commission in turn, analyzes the projects as presented, gives an accurate and adequate summary of the discussion, often in the words of the speakers. The reader is thus enabled to follow the project from its introduction to its final victory or defeat, and it is not too much to say that a careful study of this book will enable the reader to form a correct and adequate idea of the proceedings of the entire conference. It is photographic, and a detail, however insignificant, does not elude the author.

M. Lémonon, however, does not content himself with setting forth the origin of the doctrine and its progress at the conference; he weighs impartially the advantages and disadvantages of the various measures, and in fullness of knowledge criticises and appreciates the value of the ultimate result. In the midst of details he does not lose his way, and a sense of perspective preserves him from the pitfall awaiting the mere chronicler. He is scrupulously generous to the various delegations, and if he lavishes praise upon the French delegation it is because each and every member of it is worthy of unstinted commendation. He appreciates to the full the great ability and the commanding rôle of Baron Marschall von Bieberstein and M. Ruy Barbosa, but he does not hesitate to say that the opposition of the first defeated the convention for obligatory arbitration, and that the attitude of M. Barbosa was responsible for the partial failure of the Court of Arbitral Justice. Such is the general view, and yet it is unfair to attribute the failure of the Court of Arbitral Justice to M. Barbosa. He opposed it, as he had the right to do, and as the instructions from his Government required him to do, even although he might personally have wished to see the court established. The fate of the project hung long in the balance, and if M. Barbosa had not spoken for its adoption, and voted for it at the last session, the project as a whole, consisting of thirty-five articles, could not have been adopted, for M. Barbosa had become, by means of his great ability and his skill in debate, the spokesman of Latin America, and had he opposed the final adoption of the project it is within the knowledge of the present reviewer that it would have been defeated. It is fair to say that the opposition of M. Barbosa prevented the composition and therefore the establishment of the court. It is only justice to point out that M. Barbosa's acceptance of the project from which the articles concerning its composition were eliminated secured the adoption of the thirty-five articles constituting the project and the recommendation to the powers to establish the court by diplomatic negotiation.

An example of M. Lémonon's skill in handling difficult and complicated subjects is shown in the chapter dealing with the treaty of obligatory arbitration (pp. 121–187), and the broad-minded, generous appreciation of the value of the project of the Court of Arbitral Justice is shown in his chapter of fifty-nine pages devoted to it (220–279). There is a slight inaccuracy in the heading of the chapter, liable to cause confusion and mistake, because the court is spoken of as the "Anglo-American," whereas it was the joint project of Germany, Great Britain, and the United States.

These two chapters are singled out as examples of M. Lémonon's ability and skill as a chronicler. Every page of the book, however, bears conclusive evidence of an equal and comprehensive study of the proceedings of the conference.

The book as a whole is written from the standpoint of a friend of progress, who sees in the judicial organization of the world its hope of international peace and prosperity. It is a masterly treatise, and worthy of unstinted commendation, notwithstanding the haste with which it was prepared.

James Brown Scott.

*The Laws of War on Land.* By Thomas Erskine Holland. Oxford: The Clarendon Press. 1908.

Article I of the convention concerning the laws and customs of war on land adopted by the Hague Conference of 1899 provided that—

> The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the "Regulations respecting the laws and customs of war on land" annexed to the present convention.

In conformity with this provision the British Government published, in the year 1904, a handy little manual containing the laws and customs of war on land as defined by the Hague convention of 1899. The preparation of the manual was intrusted to Professor Holland, who endeavored and succeeded within the compass of 106 articles to codify the laws and customs of war, using the provisions of the Hague convention as a basis and supplementing them by the Geneva Convention, the Declaration of St. Petersburg, and the various declarations of the First Conference. As was to be expected, portions of the subject were untouched by these conventions and declarations. Therefore Professor Holland codified existing custom and practice so as to complete and round out the provisions. The official texts were printed in heavy type, whereas his own additions were in ordinary type. The reader, therefore, was able at a glance to see in how far the laws and customs of war have been codified by international agreement and in how far unwritten law and custom enter into the laws of war.

Professor Holland has taken advantage of the Second Hague Conference to revise his code of 1904, *i. e.,* the various conventions dealing with the laws and customs of war adopted at the last conference, such as Convention III regulating the outbreak of hostilities; Convention IV, the revision of the convention of 1899 concerning the laws and customs of war; and Convention V, concerning the rights and duties of neutral powers and persons in time of war. The Geneva Convention of 1906 has superseded the Geneva Convention of 1864 and 1868, and Professor Holand, who was a delegate to the convention of 1906, naturally avails himself of its provisions.

A careful comparison of Professor Holland's code of 1904 with his revised code of 1908 shows, first, that the latter has been increased by from 104 articles to 140 (139); that the arrangement of the articles has been varied; that the order of the revised convention of 1907 has been followed, with a few trifling exceptions; and that the articles due to

Professor Holland have been retained, with slight modification of their wording, where their subject-matter was unaffected by the conventions of the Second Conference. Professor Holland's little work of 1904 was a sound, conservative piece of work and subsequent and ample reflection has confirmed the views then formed and expressed. The book of 1908 preserves the distinctive features of its predecessor — namely, the individual contributions by Professor Holland are printed in ordinary type, conventional provisions in heavy type. Where, however, a provision seems to be inconsistent with generally accepted authority or with reason Professor Holland has in the present work inclosed it in brackets, so that the reader is warned in advance of its doubtful nature. In 1904 each article was annotated and in 1908 Professor Holland has retained much of his previous annotation, but has enlarged it in order to render it more adequate. The comment, however, is admirably brief, for the code of 140 (139) articles, with comment, takes up but 58 pages of the book.

The appendix is not the least valuable part of the work and consists of brief notes; of national instructions as to the laws of war on land; historical notes on the diplomatic acts which relate to war on land (Geneva conventions of 1864, 1906; Declaration of St. Petersburg, 1868; Hague conventions concerning the laws of war on land, 1899, 1907; the Hague declarations of 1899, 1907; the Hague Convention III of 1907; the Hague Convention I of 1907); the French text of the final act of the Peace Conference of 1907; also the eight diplomatic acts bearing on the law of war on land, with translations; and lists of powers which are parties to the eight diplomatic acts. This valuable matter is compressed within 73 pages, and the work closes with an adequate index.

The introductory chapter not only explains the method followed in the book, but has valuable suggestions concerning the form which diplomatic agreements should assume.

The work of Professor Holland can not be too highly commended and welcomed, for monographs on certain limited fields of international law are necessary and general codification should be preceded by careful comprehensive codifications of the expert. The only slip noticed by the reviewer is on page 39 and consists, it would seem, of a misprint, for article 66 is followed logically and necessarily by article 68. Number 67 is lacking, which will doubtless be corrected by a renumbering of the articles in a new edition.

James Brown Scott.

*Deuxième Conférence Internationale de la Paix. Actes et Documents.* Tome premier. Séances Plénières de la Conférence. La Haye: Imprimerie Nationale. 1907. pp. xvii, 723.

A notice inserted in the volume under consideration states that the collection of the acts of the Second Conference is divided into three volumes, of which the first contains the program, the list of delegates, the minutes of the plenary sessions, the reports presented to the conference, and the conventions. The second volume is to contain the minutes of the sessions of the first commission, of its subcommissions and its committees, and appendices containing the projects, propositions, and communications from the various delegates, as well as the various synoptic tables prepared and presented to the conference during the course of its deliberations. The third volume is devoted to the proceedings of the second, third, and fourth commissions, and it is stated that this final volume will contain an alphabetical index. The official report of the First Conference appeared in three volumes, which by the use of India paper are compressed into a single handy volume. This volume, however, is difficult to use because it lacks a general and special index. The announcement, therefore, of the Dutch Government that the official report is to be properly indexed will be welcome news to those who may have occasion to use the official report.

The first of the three volumes has already appeared and is a beautifully printed volume, to which there is prefixed an admirable analytical summary of the plenary sessions and their proceedings, so that it is possible by consulting the table of contents to refer with ease and dispatch to any part of the volume. The plenary sessions were as a rule formal, because substantial agreement was reached in commission before the project was presented to the conference in plenary session for ratification. The discussions in the plenary session were perfunctory and of comparatively little value. As, however, the projects submitted for approval were accompanied by the official reports prepared by the various *rapporteurs*, which reports explained the projects, their underlying principles, and their official interpretations, the reader of this volume has before him the final positive results of the conference, and is in a position to judge the nature, the extent, and the probable value of the conference. While the subsequent volumes will be of great value as showing the original form of the projects, the changes which they underwent and the reasons advanced for their acceptance or rejection, these volumes will be of special service to the student. The general reader may well content himself with the first volume containing the acts and documents as finally adopted by the conference in its plenary sessions.

It may be of interest to state that while the collection of acts and documents is published by the Dutch Government, the volume may be purchased from Martinus Nijhoff, at The Hague, for seven florins, and that the American reader may obtain the volume directly from Messrs. Stechert & Co., New York City.

*La Segunda Conferencia de la Paz.* By Antonio S. de Bastamante y Sirvén. Libraría General de Victoriano Suarez, Madrid, 1908. Two volumes. pp. 444 and 392.

The author, a member of the Hague Conference of 1907, furnishes in these volumes a useful and interesting résumé of the work of that body, giving an idea of the general course of the discussion relative to each topic considered. As one of the earliest large contributions to the literature of the subject, their appearance is welcome.

In detail, the author discusses briefly the history of the first convocation, next taking up the method of summoning and the organization of the conference of 1907. He considers at length the subject of disarmament, recognizing the futility of a determined attitude on the part of the smaller powers in favor of disarmament, while public opinion in the larger ones had not yet become sufficiently aroused with relation to the proposition. Upon the question of coercion for the collection of national debts, he believes, as was to be expected, that the protection of its nationals should not compel a state to convert itself into an executor of contingent agreements or a knight-errant in matters concerning the purse. The conclusions of the conference relative to international commissions of investigation receive his praise, while its work upon the subject of arbitration, little fruitful as it was, is given ample and interesting review.

The questions of war presented to and voted upon by the conference — declaration of war, delay of favor, laws of terrestrial and maritime war, transformation of merchant ships into vessels of war, blockade, bombardment, enemies' property in maritime war, exemptions from capture, rights and duties of neutral nations in time of war, rights of neutrals in territory of the belligerents, contraband of war, destruction of neutral prizes, maritime inviolability of postal correspondence, and the International Prize Tribunal — are all fully discussed. The steps necessarily to be taken for the calling of a new conference receive attention.

In summing up the work of the conference, as compared with that of 1899, the author finds that the changes display a liberal and progressive tendency, and that no motion prospered in which could be discovered any attempt to retire from the path indicated by the First Conference. He also takes great pride in the fact that all attacks upon the principle of the equality of states came to naught. In concluding, he says that —

> We went from The Hague with the firm conviction, after mature and calm reflection, that the conference of 1907 had contributed in the measure of its duty to the well being of humanity and to the progress of international law.

The work concludes with (in Spanish) the treaties of Geneva of 1864 and 1906, and with the various Hague treaties of 1899 and 1907.

JACKSON H. RALSTON.

# PERIODICAL LITERATURE OF INTERNATIONAL LAW

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